

12-13-2012

Smith v. State Appellant's Brief Dckt. 39705

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Smith v. State Appellant's Brief Dckt. 39705" (2012). *Not Reported*. 769.
https://digitalcommons.law.uidaho.edu/not_reported/769

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

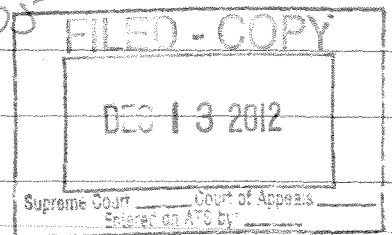
DANA WDELL SMITH
PETITIONER - APPELLANT,

APPELLANT'S BRIEF

v.

NO. 39705

STATE OF IDAHO
Respondent - Appellee



BRIEF OF APPELLANT'S

APPEAL FROM THE DISTRICT COURT OF THE FIFTH Judicial
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF MINIDOKA

HONORABLE MICHAEL R. CRABTREE
DISTRICT JUDGE

DANA WDELL SMITH
PRO SE
INST A-3-87
P.O. Box 51
BOISE, ID 83707

RUSSELL J. SPENCER
Deputy Attorney General
P.O. Box 83720
BOISE ID 83720-0010

TABLE OF Content

PAGE

TABLE OF Authorities

STATEMENT OF THE CASE

Nature of the case

statement of the facts and
course of proceedings

ISSUES PRESENTED ON APPEAL

ARGUMENT

I. Appellant asserts that the District Court and the Idaho Supreme Court erred in its denial on the motions requesting the appointment of counsel.

A. INTRODUCTION

B. APPLICABLE LEGAL STANDARDS

1. Claims of Denial of Access to the Courts and Effective Assistance

2. STANDARD OF REVIEW

11. Appellant asserts That The Petition For Post-Conviction WAS Filed IN A Timely MANNER AND THAT THE DISTRICT COURT ABUSED ITS DISCRETION When IT Summarily Dismissed The Petition BY STATING That IT WAS UNTIMELY.

A. INTRODUCTION

B. Applicable legal STANDARDS

1. Successive Petition For Post-Conviction Statute of Limitation

C. THE RECORD AND EVIDENCE IS SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT THAT Appellant Filed the Motion IN A Timely MANNER AND THAT HAD IT Ruled IN ACCORDANCE WITH the Statute, Rules AND CASELAW Appellant would Present to the Court A Meritorious Claim with Evidence to Substantiate those Claims.

1. INITIAL Post Conviction

2. Successive Post Conviction

Conclusion

Certificate of SERVICE

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
Abbot v. State, 1996, 129 Idaho 381, 924 P.2d 1225	12
Abdullah v. Guster, 949 F.2d 1032 1035 (8th Cir. 1991)	10
Barnard v. Smith, 430 U.S. 817 825-26 92 S.Ct. 1491 (1977)	7
Brady v. Maryland, 373 U.S. At 83-87 (1963)	18
Douglas v. California, 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811 (1963)	7
Ex parte v. Hall, 312 U.S. 546 61 S.Ct. 640 85 L.Ed. 7034 (1944)	6
Gardner v. California, 393 U.S. 362, At 369-370, 89 S.Ct. 580, 582, 21 L.Ed.2d 601 (1969)	8
Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594-595, 30 L.Ed.2d 652 (1972)	8
Hernandez v. State, 1999, 133 Idaho 794, 992 P.2d 789	12, 13, 19, 20
Lindquist v. Idaho State Board of Corrections, 776 F.2d 851 (1985)	9
Muchow v. State, 142 Idaho 401, 402-03, 128 P.3d 938, 939-40 (2006)	11

Ross v. Moffitt, 417 U.S. At 616 94 S.Ct. At 2447; 7

Ross v. Moffitt, 417 U.S. At 611 612 615 94 S.Ct. At 2444-2446 7

Schwartz v. State 2008 177 P.3d 400 140 Idaho 136 13, 14, 19, 21
Reviews denied

STATUTES

I.C. § 19-4201 12

I.C. § 19-4236 12

I.C. § 19-4902 12

I.C. § 19-4901(b) 12

I.C. § 19-4908 12

I.C. § 19-4208

12, 17

I.C. § 19-4911

I.C. § 19-4901 to 4911 12, 17

2008 U.S.C.A.

28 U.S.C.A. § 753(f)

6

28 U.S.C.A. § 1915

6

28 U.S.C.A. § 2255

6

I.R. 57

17

I.R.C.P. 86(a)(1)(2)(3)

7

Fed. R. Civ. P. 86(XI)

6

Supreme Court Rule 15 subd 1(E)

6

42 U.S.C.A. § 1983

5

Corpus Juris Secundum

Criminal law 1403

12

Criminal law 1668(7) ~~(8)~~

14

Criminal law 1668(a)

12, 13, 19, 20, 21

Criminal law 1586

19

habeas Corpus 285.1

12

habeas Corpus §13

12

CONSTITUTIONAL PROVISIONS

U.S. Constitutional Amend. I

6, 7, 8, 9, 10, 11

U.S. Constitutional Amend IV

18

U.S. Constitutional Amend V

8,

U.S. Constitutional Amend VI

13

U.S. Constitutional Amend XIV

6

RULES

I.C.R. 57

12

I.R.C.P. 8(a)(1)(2)(3)

7

Fed. R. Civ. P. 8(a)(1)

6

Supreme Court Rule 15 subd 1 (E)

6

STATEMENT OF THE CASE

NATURE of the Case

PETITIONER Appeals from the district Court's Memorandum Decision and Order for the dismissal of Post Conviction. PETITIONER Appeals from the DISTRICT COURT'S AND Supreme Court's denial of the Motion For the Appointment of Counsel. PETITIONER will show that the district ~~with~~ ABUSE IT'S DISCRETION BY ITS statement, that the Post-Conviction was filed untimely was ERRONEOUS AND VIOLATED PETITIONER'S Constitutional Rights. PETITIONER will show that the district Court should have order a psychiatric Evaluation based on evidence presented to the Court on various occasions, AND ITS failure to do so violated IDAHO LAW AND THE Rights of the PETITIONER. PETITIONER requests that this Court remand the matter for further proceedings, AND hereby order AN Evidentiary hearing with the APPOINTMENT OF Counsel.

statement of the facts and Course of Proceedings

ON FEBRUARY 18 2001 PETITIONER filed A Successive petition for Post-Conviction in THE DISTRICT Court in MINIDOKA Count. (R., pp. 1-47.) A MOTION for THE APPOINTMENT OF Counsel AND MOTION TO Proceed in forma pauperis WERE filed along with the petition for Post-Conviction. 151 pages of Evidence along with ~~along~~ All of the Trial transcripts were filed ON July 14, 2011.

ON AUGUST 30, 2011, Appellant's MOTION REQUESTING THE APPOINTMENT OF COUNSEL WAS DISMISSED. NOVEMBER 21, 2011, NOTICE OF INTENT TO DISMISS POST-CONVICTION APPLICATION WAS FILED WITH THE COURT. AN ORDER ~~ENTRY~~ OF JUDGEMENT OF DISMISSAL WAS ENTERED JANUARY 03, 2012. (R.; REGISTER OF ACTION).

Appellant Raised twelve (12) issues involving violations OF THE FIRST, FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS RIGHTS OF THE CONSTITUTION. (R., pp. 1-47) Appellant asserts that the denial of the Appointment of Counsel violated his right to access the courts due to no law library at the prison. Appellant, ALSO asserts that the District Court ERRED in its DISMISS OF THE Post Conviction by its statement that it was ~~not~~ untimely, when the Register of Action and Statute state otherwise. Appellant also states that the Idaho Supreme Court's denial of the Appointment of Counsel, also denied the Appellant his Constitutional and statutory right to access to the courts. AND the failure to order a psychiatric evaluation before dismissal of the post-conviction substantiates, the abuse of discretion OF the courts OR whomever ~~order~~ should have ordered this to check the mental status of the Appellant and his ability to proceed without assistance.

In this Appeal, Appellant will show that the district Court abused its discretion AND ERRED in its dismissal of

the petition for post conviction and the motion for the
Appointment of Counsel. Also that the Supreme Courts
Denial of the Appointment of Counsel violated the United
States Constitution. These force the District Court and
the Supreme Court ERRED.

ISSUES

- 1) Did the district Court AND THE IDA Ho Supreme, when it failed to Appoint Counsel After Appellant Advised them that there was no Law library AT THE PRISON.
- 2) Did the district Court ERR when it dismissed the Appellant's petition for Post-Conviction as being untimely.
- 3) Did the district Court ERR in not ordering A psychiatric Evaluation sua sponte before its dismissal of the petition for post-conviction and the Motion For THE Appointment of Counsel.

Argument

APPELLANT ASSERTS THAT THE DISTRICT COURT ERRED AND THE IDAHO SUPREME COURT ERRED IN ITS DISMISSAL OF THE MOTION REQUESTING THE APPOINTMENT OF COUNSEL

A. Introduction

Appellant asserts that the district court and the Idaho Supreme Court violated his right to access to the courts, and the Due Process Clause, by its denial of the appointment of counsel. Appellant will show that he presented a material issue of fact that had counsel been appointed or adequate access to the courts been provided based on rulings from the United States Supreme Court and the Constitution that dismissal of the post conviction would not have occurred. And Appellant post-conviction would have proceeded to an evidentiary hearing.

B. Applicable legal Standards

1. Claims of Denial of Access to the Courts

Fundamental Constitutional right of access to courts requires prison authorities to assist inmates in preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate ~~law library~~ persons trained in the law. 42 U.S.C.A. § 1983; U.S.C.A. Const.

Amend 14, Fed. Rules, Civ. Proc. rule 8(2)(3), 28 U.S.C.A.;
28 U.S.C.A. § 753(f), 1915, 2255, Supreme Court rules,
Rule 15, subd. 1(e), 28 U.S.C.A.

It is now well established beyond a reasonable doubt that prisoners have a constitutional right of access to the courts. The United States Supreme Court long struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus and post-convictions unless they were found "properly drawn" by the "legal investigator" for the parole board. *Ex parte Hull*, 372 U.S. 546, 61 S. Ct. 640, 25 L. Ed. 1034 (1941). The Supreme Court held that this violated that the state and its officers may not abridge or impair petitioner's right to apply for a motion, application, writ of habeas corpus, or any action in a court. The fact that not only does the Idaho State Board of Corrections not provide a constitutionally adequate law library or adequately trained individuals in the law but that the Resource Center is developed by a deputy warden and attorney general's staff, abridges any right for a prisoner to have "adequate, effective, and meaningful" access to the courts.

More recent decisions have required remedial measures to insure that inmates access to the courts is adequate, effective, and meaningful. Because this Court must recognize that "adequate and effective appellate review" is ~~possible~~ impossible without a trial transcript or

adequate substitute the Idaho Supreme Court abused its discretion in not providing those documents, from the district Court when requested by the Appellant, thereby violating the Appellants Due Process Rights under the Fourteenth Amendment of the United States Constitution. SEE Appendix for motion.

Similarly, Board's stated that Counsel must be appointed to give indigent inmates "A meaningful appeal" from their convictions. Douglas v. California, 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed. 2d 811 (1963). The United States Supreme Court reaffirmed that states must "assure the indigent defendant an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S. at 616, 94 S.Ct. at 2442. "[M]eaningful Access" to the Courts is the Touchstone. SEE id., at 611, 612, 615, 94 S.Ct. at 2444-2446.

Although it is essentially true as Appellant argues that his Appeal and post-conviction need only set forth facts giving rise to the cause of action, but see, 28 A.R.C.P. 82A(1)(2)(3), it hardly ~~must~~ follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, and types of relief available. Most importantly, of course, a lawyer ~~is~~ must know what the law is in order to determine whether a colorable claim exists, and if so,

what facts are necessary to state a cause of action.

if a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner, indeed, despite the "less stringent" standards by which a pro se pleading is judged. *Harris v. Kerner*, 404 U.S. 572, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972). It is often more important that the Appellate Complaint and Appeal set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the documents sufficiently and may dismiss the case if it is deemed frivolous. Moreover, if the Court on the state files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations which the Appellant has no access to or research tools to rebut that assertion without a law library, an inmate will be unable to rebut the state's on the Court's Argument. It is thus not enough to answer that the Court will evaluate the facts pleaded in light of the relevant laws. Even the most dedicated trial judges are bound to overlook Meritless cases without the benefit of an Adversary presentation. Cf. *Gonzalez v. California*, 393 U.S. 367, at 369-370, 89 S.Ct. 580, 582, 21 L.Ed.2d 601 (1969).

The need for new legal research or advice to make a meaningful initial presentation in such a case is far greater than is required to file an adequate petition or Appeal for discretionary review. THE IDAHO STATE

Board of Corrections only provides the following research tools which were ordered in Lindquist, they are as follows:

- (a) Idaho Code;
- (b) United STATES Code Annotated;
- (c) Federal Rules of Appellate Procedure Ninth Circuit;
- (d) Federal Rules of Evidence;
- (e) local Rules of the United States District Court for Idaho
- (f) Idaho Statute;

the prison does not provide any of the following tools so ordered by the Federal District Court:

- (a) Idaho Reports;
- (b) United States Reports;
- (c) United States Supreme Court reporters;
- (d) Federal Practice;
- (e) Federal Practice and Procedure;
- (f) Federal Practice Digest;
- (g) Shepard Citation;
- (h) Corpus Juris Secundum;
- (i) AMERICAN Jurisprudence;
- (j) Federal Reporter 2d and 3d Series;
- (k) various nutshells on

- 1. procedure,
- 2. Civil rights,
- 3. Criminal Law,
- 4. Constitutional law,

5. Legal research

- (L) West Pacific Digest 2d and 3d series;
- (M) manual for complex litigation pamphlet;
- (N) West Federal Practice Digest 2d and 3d series;
- (O) Pacific Digest 2d and 3d series;
- (P) Federal supplement.

This Court must clearly understand the importance of the rights of this Appellant. This Court and the District Court would have had to take into account the following issues before the denial of a motion for the appointment of counsel,

- (a) Factual Complexity;
- (b) The Appellant's Ability to investigate;
- (c) Conflicting testimony;
- (d) The Ability of the indigent to present his claim;
- (e) The Legal Complexity;
- (f) and the merit of the case.

It's clear this standard was not met. Abdullah v. Gustre, 949 F.2d 1032, 1035 (8th Cir. 1991) (citation omitted).

The Appellant's Allegations, if proven, clearly would establish a constitutional violation. The issues raised in the post conviction could have been easily proven, but were unjustly terminate. Appellant could not affirmatively respond to the Court due to the failure of the ~~attah~~

Idaho State Board of Corrections failure to provide the appropriate Constitutionally required research tools. This in itself should have constituted a tolling of the appellate time. On its face then, this is a meritorious claim.

2. STANDARD OF REVIEW

In this case the district court and the Supreme Court denied the appointment of counsel and the district court dismissed the petition for post conviction. Because an evaluation of a motion for dismissal will never involve the finding of contested facts by the district court, it necessarily involves only determinations of law. Accordingly, this court must review a district court's summary dismissal *de novo*. *Muchow v. State*, 142 Idaho 401, 402-03, 128 P.3d 938, 939-40 (2006)

11.
APPELLANT ASSERTS THAT THE PETITION FOR POST-CONVICTION WAS FILED IN A TIMELY MANNER AND THAT THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY DISMISSED THE PETITION BY STATING THAT IT WAS UNTIMELY.

A. INTRODUCTION

Appellant will show that a material issue of fact exists, that demonstrates that the district court erred, when it erroneously dismissed Appellant's successive petition

for post conviction by ruling that it was filed untimely.

B. Applicable legal standards

1. Successive PETITION FOR POST CONVICTION STATE OF Limitation

Idaho Criminal Rule 57 is the Uniform Post-Conviction Procedure Act under I.C. § 4901; 4911. The Uniform Post-Conviction Procedures Act (UICPPA) comprehends and replaces all other common-law, statutory, or other remedies, including writ of habeas corpus, that were previously available to collaterally challenge validity of conviction or sentence and therefore, once time for direct appeal has expired the exclusive vehicle to present claim that conviction or sentence was entered in violation of constitutional or statutory law is application for relief under UICPPA. I.C. § 19-4901(b), § 19-4201, § 19-4236. Abbott v. State, 1996, 129 Idaho 381, 924 P.2d 1225. Criminal law 1403; Habeas Corpus 285.1; Habeas Corpus 513

One year is a reasonable time for an inmate to proceed ~~pro se~~ with a successive post-conviction relief action if the initial action was dismissed due to ineffective assistance from the attorney representing the inmate in that proceeding. U.S.C.A. Const. Amend. 6; I.C. §§ 19-4902, §§ 19-4908. Hernandez v. State, 1999, 133 Idaho 794, 992 P.2d 789. Criminal law 1668 (9)

If An initial post Conviction Action was timely AND WAS
been concluded, An inmate may file A subsequent application
outside of the one-year limitation period if the courts
finds A ground for relief asserted which for sufficient
reason WAS NOT asserted or was inadequately raised in
the original, Supplemental or Amended Application. Schwartz
v. State, 2008, 17 P.3d 400, 145 Idaho 186 Review denied
Criminal 11668 (9)

Appellate's pro se successive application for post-
Conviction relief, which was filed almost one year after
the Supreme Court's determination at the Appeal in his
initial post-conviction proceeding, was timely, under facts
of case. Where inmates initial action had been summarily
dismissed due to post conviction counsel's ineffective
assistance in filing Application that contained only conclusory
allegations and in failing to respond to court's notice of
intent to dismiss. U.S.C.A. Const Amend. 6, I.C. §§ 19-40
4902, 19-4208 Hernandez v. State, 1999, 133 Idaho 794, 992 P.2d
789 Criminal Law 11668 (9)

When A second or successive Application is presented
because the initial Application was summarily dismissed due
to the alleged ineffectiveness of the initial post-conviction counsel,
use of the relation-back doctrine may be appropriate,
because failing to provide A post conviction Applicant with
a meaningful opportunity to have his or her claims
presented may be violative of due process. Schwartz v.

State, 2008, 177 P.3d 400, 145 Idaho 186, Review denied Criminal Law 1668 (7)

Ineffective Assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately post-conviction application. Schwartz v. State, 2008, 177 P.3d 400, 145 Idaho 186, Review denied Criminal Law 1668 (7)

C. THE RECORD AND EVIDENCE IS SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT THAT APPELLANT FILED THE MOTION IN A TIMELY MANNER AND THAT HAD IT RULED IN ACCORDANCE WITH THE STATUTE, RULES, AND CASE LAW APPELLANT WOULD HAVE PRESENTED TO THE COURT A MERITORIOUS CLAIM WITH EVIDENCE TO SUBSTANTIATE THAT CLAIM.

1. INITIAL POST CONVICTION

On July 7, 2008, Appellant filed a Petition for Post-Conviction Relief. (Exhibit) In that Petition for post-conviction Clayton S. Zollinger Jr. was appointed as counsel, on November 24, 2008, to represent the Appellant. Formal contact was never made with Appellant, until December 12, 2009. Appellant requested new counsel and new counsel was appointed on ~~the~~ January 25, 2010. Appellant did not meet with that counsel, whom was DANIEL BROWN until after he had filed a Bar Complaint

Against Daniel Brown.

At this point Appellant started receiving paper-work from Greg Fuller, who was the Managing Attorney in that office. Appellant never talked with Mr Fuller, AND NEVER GAVE CONSENT, for Mr Fuller to Represent him. Mr Fuller NEVER felt any ~~Reason~~ Remorse, eventually, even at the Bar hearing.

This Court will see that the issues Raised were Many, which included:

- (a) Violation of the Sixth Amendment;
 - (1) failure to investigate the facts of the case or potential defenses;
 - (2) failure to Adequately prepare for a hearing or trial;
 - (3) failure to call Relevant witnesses;
 - (4) failure to file motions;
 - (5) failure to object to specific Evidence;
 - (6) failure to diligently investigate this case;
 - (7) failure to protect due process.
- (b) Violation of the Fifth Amendment;
 - (1) Violation of Miranda warning;
 - (2) Violation of Speedy trial;
 - (3) Post indictment line-up;
 - (4) Right to Counsel during Interrogation;

(6) Right to Counsel during A line-up.

(7) Violation of the ~~Fourth~~ Amendment;
(1) Violation of Search and Seizure;

(2) Probable Cause;

(3) Rights of A Person in Custody;

(4) Particularity of Warrants;

(5) Issues with Bad and Good Faith Searches.

(1) Violation of the Fourth Amendment;

(1) Violation of Due Process Clause;

(2) Violation of Equal Protection.

The only issues raised during this post-arrest
was about me not having expert witness, and
effective assistance of counsel, which the trial
was not legally my attorney failed to secure evidence
such as: 1) expert testimony, 2) depositions, 3) NIT's
from the state on Joshua E. Johnston, 4) Evidence about
statute and rules about jurisdiction, 5) Medical Records,
and blood from witnesses. Appellant asks, what as the
the use of counsel, if they don't do the basic medical
jobs required of them.

The Appellant filed motions for suppression, discovery,
and a motion to traverse claims and to expand the record,
and so motion for relief from a judgment of the District
court. A memorandum of law in support of the motion for

relief from a judgment or order, AND Motion for Ex parte Order to transport, Motion for ²A Faretha Hearing.

Appellant's Notice of Appeal was filed ~~at~~ on June 12, 2010. There was also another Notice of Appeal filed on October 15, 2010. The Supreme Court Affirmed the District Court Summary dismissal on November 16, 2011.

2. Successive Post Conviction

Appellant filed A Successive petition for Post-Conviction Under I.C.R. 57, § 19-4901 and the ILPCRA in case number CV-2011-000,246 on February 18, 2011, in the County of Winnebago. An Application AND motion for the Appointment of Counsel, was filed in the Court. The Appellant raised the following issues:

- (a) Right to Counsel at a Pre-trial line-up;
- (b) Ineffective assistance of Counsel At trial;
- (c) Ineffective Assistance of Counsel on Appeal;
- (d) The Court Admitted prejudicial hearsay;
- (e) The prosecution suppressed evidence favorable to the
- (f) The prosecution in Bad faith Contentiously, Failed to collect (Preserve) evidence Potentially favorable to the defense.
- (g) The Government failed to disclose the identity of an Informant ~~at trial~~, who actively participated in, was a Peripent witness to the crime of which

- Appellant was convicted.
- (h) ~~Petitioner~~ Appellant's conviction was obtained on the basis of state court errors that denied him a fair trial.
 - (i) Appellant was denied discovery of confidential records that were material and pertinent to the defense.
 - (j) Appellant was selectively prosecuted on the basis of race.
 - (k) Appellant was incompetent to go to trial.
 - (l) Petitioner was convicted on less than proof beyond a reasonable doubt of every element of the crime as charged.
 - (m) The prosecutor knowingly used perjured testimony - or failed to correct known false testimony - to obtain Appellant's conviction.
 - (n) The prosecution failed to disclose "Brady" (exculpatory) material that was in the hands of investigating agencies.
 - (o) Appellant's confession was obtained during a police interrogation in which Appellant was denied to have counsel present.
 - (p) Appellant's right to ~~have~~ adequate law library and legal assistance was denied by the Idaho State Board of Corrections and the Court.
- SEE CRJ, pp. 1-46)

Appellant again raised issues of ineffective assistance of trial counsel, Appellate counsel, and post-conviction counsel. The evidence was clear when the Court of

Appellate AND Idaho Supreme Court ISSUED ITS Opinion. (SEE state v. Smith, unpublished Opinion NO. 467); (SEE Smith, v state, unpublished Opinion NO. 699) These opinions show the level of counsel's Adequacy. They both show that Counsel's failure to secure Evidence IS why they Affirmed, the district Court's decision to summarily dismiss the Claims brought IN the post-Conviction, ~~on~~ on direct Appeal.

The district Court dismissed the successive petition for post-Conviction on January 3, 2012, because it claimed that it was filed untimely AND that it was beyond the statute of limitations. Appellant filed ARA motion to Alter OR Amend the Judgment on Decree AND Motion for the Appointment of Counsel on February 25, 2012.

The Appellant WAS unsure, AS to why, the Court stated that the Application WAS untimely, because, IN the Motion to Clarify which was filed on September 29, 2011, the Appellant cited, HERNANDEZ v. State, 1999, 133 Idaho 294 992 P.2d 789, Criminal Law 1668(7); Schwartz v State, 2009, 177 P.3d 400, 145 Idaho 186, review denied Criminal Law 1586; Criminal Law 1668(9) SEE Schwartz v State, 2008, 177 P.3d 400, 145 Idaho 186, review denied. THE Court received multiple request for pieces of Evidence AND presented multiple pieces of Evidence, which the Court classified AS Ex parte communications, specifically IN this INSTANCE ON ~~the~~ July 14, 2011.

Appellant's prior post-conviction was Affirmed on November 16, 2011, and the successive was filed on February 08, 2011. Appellant is unsure of where the Court believe that the Appellant's Application was filed untimely.

Clearly an inmate's prior successive application for post conviction relief, which was filed almost a year after the Supreme Court's determination of an appeal in his initial post conviction proceeding was timely under facts of his/her case, where inmate's initial action had been summarily dismissed due to post conviction counsel's ineffective assistance in filing application that contained only conclusory allegations, and in failing to respond to Court's notice of intent to dismiss. U.S.C.A. Const. Amend. 6; Hernandez v. State, 1999, 133 Idaho 794, 992 P.2d 789, Criminal Law 16608 (9)

Appellant understood the law to read that one year is a reasonable time for an inmate to proceed, prior with a successive post conviction relief action if the initial action was dismissed due to ineffective assistance from the attorney representing the inmate in that proceeding. HERNANDEZ V. STATE Also when a second or successive application is presented because the initial application was summarily dismissed due to the alleged ineffectiveness of the initial post-conviction counsel, use of the relations back doctrine may be appropriate because

failing to provide A post-conviction Applicant with A meaningful opportunity to have his or her claims presented may be violative of due process. Schwartz v. State, 2008, 177 P.3d 400, 145 Idaho 186, review denied Criminal Law 11668 (9) And since ineffective assistance of prior post conviction counsel may provide sufficient reason for newly asserted allegations or allegations inadequately raised in the initial Application to be raised in A subsequent post-conviction Application. Schwartz v. State

The Appellant met the time limitation and all of the issues which had to be met in order to have A successive petition ~~be~~ heard, including submitting evidence, requesting interrogatories, medical records, evidence of Joshua E. Iverson's fingerprinted NCIC (index record) & disqualification of Judge AND ~~the~~ change of venue yet every single motion has been dismissed that has been filed pro se. The district court clearly has violated due process by its failure to at least order the Appellant to have An evidentiary hearing, AND secure testimony from those witnesses which Appellant requested subpoena'd.

Appellant contends that had the district court ruled in accordance with Supreme Court mandates ~~it would~~ Appellant's successive petition would have been meritorious. The district court clearly did not want this to happen AND its ruling is clearly erroneous.

-711

Appellant presents a material issue of fact that a conflict of interest existed, that Gregory Fuller was not his counsel, and that he acted without consent, or the ~~known~~ knowledge of the Appellant, which was detrimental to Appellant. The Court had a duty to have a hearing to obtain a waiver on conflict of interest, after it was notified about the conflict, between him, and Appointed Counsel Daniel Brown. In other words, Appellant contends that had there not been a breakdown in communication or irreconcilable differences between ~~him~~ himself and Daniel Brown and Gregory Fuller, the Attorney would have still properly investigated the case, pursued discovery, motions, ~~and pursued~~ or collected other evidence, which was needed to win. Appellant ask this Court to order a new trial or to remand this case for an evidentiary hearing, because a material issue of fact exists.

Conclusion

Appellant respectfully requests that this Court order a new trial or reverse the summary dismissal of the successive Application, and motions, and remand the matter for an evidentiary hearing.

Dated this day of December 2012

DANA Hodel Smith

Exhibit 1

Police Records and statements
made by the states witnesses

12:34

Valley City Police Department LAW Incident Table:

Page:

2

Case Number: 04I053239

DispCall: ASGIST AGENCY

Related Cases:

Image:

Addr: 3575 S MARKET ST; 2800 W

Area: WVC

W Valley PD A

City: W VALLEY CITY

St: UT Zip:

Contact:

Complainant:

Lst: Fst: Mid:
DOB: / / SSN: - - Adr:
Race: Sex: Tel: () - Cty: St: Zip:

Offense Codes:

Reported:

Observed:

Circumstances: LT11

Responding Officers: WRIGHT, JAMES

Responsible Officer: WRIGHT, JAMES

Agency: WVPD

CAD Call ID: C1370442

Received By: CHAMBERS, B

Last RadLog: 11:11:33 10/07/04 24

How Received: O Officer Report

Clearance:

When Reported: 11:11:13 10/07/04

Disposition: SF

Disp Date: 10/07/04

Occurred between: 09:00:00 10/07/04

Judicial Sta:

and: : : / /

Reviewed By:

NO:

Synopsis: (See below)

Notes: (See below)

INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
WM	351524	10/07/04	Smith, Dana Lydell	suspect
:	403049	10/07/04	Johnston, Joshua Earl	involved
CA	C1370442	10/07/04	11:11 10/07/04 ASGIST AGENCY	*Initiating Call
PR	231144	10/07/04	photo Lineup	\$0 evidence

AW Incident Circumstances:

Contributing Circumstances

Seq	Code	Comments
1	LT11	Government/Public Bldg

AW Incident Responders Detail

Responding Officers

Seq	Name	Unit
1	WRIGHT, JAMES	BD14

In Radio Log Table:

Time/Date	Type	Unit	Code	Zone	Agency	Description
11:33 10/07/04	1	BD14	24	WVPD3	WVPD	incid#=04I053239 Assignment Co
11:14 10/07/04	1	BD14	ARRVD	WVPD	WVPD	On-site call=5001

Sgt. Name _____ Date _____ Narrative _____

J. Wright 0148 Thu Oct 7 12:16:32 MDT 2004.

Sgt. Elson received a request from the Chief to assist on an auto theft case which occurred in Minidoka County, Idaho. The suspects traveled to Idaho from Salt Lake County to perpetrate the crime. Elson asked that I contact the victim and Minidoka County Sheriff's Office to assist in any way we could.

I spoke with the victim, Dan Price (200-431-3500), who is the owner of the Pay Less Sales auto dealership in Burley, Idaho. Dan discovered on 10/3/04 that someone broke into his business and took the keys to several vehicles on the lot, as well as dealer license plates. The suspects loaded vehicles and trailers to steal them. One of the suspects, Josh Johnston of Woods Cross, contacted his parents by telephone. The parents responded to Idaho to pick him up. Josh and his parents called police in Idaho to report the auto theft situation. The second suspect, known as Dana, took one 2003 Chevy Duramax truck, maroon, and a 7X14 Pace American Cargo trailer, white, and left. Josh assisted Minidoka County Sheriff's Office in the investigation of the burglary and auto thefts.

Josh Johnston reported that he was in the parking lot of a bar in Salt Lake and was approached by Derrick Thompson. Derrick asked Josh if he was good with computers, which he said he was. Derrick took Josh to his house at 610 South 1300 West in Salt Lake City. Derrick said he was into making false identification, checks, etc. Derrick introduced Josh to "Dana", a black male about 30 years old, at the residence. Josh said Dana (also known as DD) asked him to go to Idaho with him to get the vehicles. Josh drove Dana to his residence (Josh's house) on the morning of 10/3/04, prior to the incident in Idaho. Dana drove Josh's car, with Josh, to the car lot in Idaho where they broke in and took the keys. They drove 2 new Chevy Duramax trucks to a gas station where they gassed up the trucks. Josh drove the truck he was in into a concrete barrier, doing damage to the truck. Josh said when they went back to the car lot to load up more vehicles and trailers he got scared and felt he was "in too deep". He called his parents and the police. Josh said Dana "slipped him something" and he wasn't thinking clearly. Josh said Dana told him he just got out of jail for drugs.

The case is being investigated by Minidoka County Detective Vick Watson (200-434-2320) and his supervisor, Randy White (200-312-4379).

While brainstorming this case, Detective Hoffman (WVPD) and I recalled a black suspect named Dana on cases of Forgery/Fraud in West Valley City. I located the male in the Spillman reporting system: Dana Lydell Smith, 10/71. I observed that Dana Smith was just released from jail on 12/27/04, having been arrested by West Valley City PD Officers on 7/14/04 under case 041038025 for warrants and charges. At the time of his arrest, Dana Smith was driving a truck with Idaho plates which did not belong to him. I observed that the jail listed an address for Smith as 3 South Montgomery St in Salt Lake (approx. 1400 West). The address

Bullshit*

up and included Dana Lydell Smith in
I met with Josh Johnston and his mother, Darla
at Darla's home in Woods Cross. I told them I had a lineup
which included a male I suspected of stealing the truck in Idaho. I
asked Josh I wanted him to view each of the six photographs and tell me
if he saw Dana who was the same Dana who took the 2003 Chevy Duramax
truck and trailer. I told him the suspect in the auto theft may, or may
not be, in the six photos. I asked him to identify the suspect if he
observed him in any of the photos. Josh viewed the lineup and began
scrutinizing the photos. I observed Josh as he passed photo #3 with his
eyes. He immediately pointed to the photo of Dana Lydell Smith and
identified him as the same male who took him to Idaho and who took the
truck. I asked him his surety and he said "100%".

At that time, Darla Johnston said, "yeah, that's the guy". I asked her
when she observed the suspect. She said Josh brought the male to her
home on Sunday morning, 10/3/04. She said the male had a hat pulled
down low, and a longer goatee, but said also that she was 100% sure the
male in photo #3 was the same male she observed at her house and went by
the name of Dana.

I had Josh and Darla sign and date the photo-lineups and indicate their
identification and surety of the suspect. The photo-lineups were booked
into West Valley Police Evidence.

After leaving Woods Cross, I checked the area in and around the possible
residences of Dana Smith and Derrick Thomson (610 S. 1300 W, 533
Montgomery, and 4000 S. Redwood Rd #2076F, another address found for
Smith). I looked for the maroon 2003 Chevy Duramax and the Pace
American trailer. I did not locate any vehicles matching the
description.

I contacted Detective Vick Watson and advised him of my findings. A
copy of the report and photo lineups will be faxed to Detective Watson.

Fileson 2155 Wed Oct 20 09:52:13 MDT 2004 041053239

Supplemental Report.

On Wednesday, 10/13/04 myself and Sgt. J. Pearce went to the Salt Lake County Jail and spoke to suspect Dana Smith (02/10/71), at the request of Det. Vic Watson with the Minidoka County Sheriff's Office in Idaho. I was advised by Det. Watson and victim Bob Price that Mr. Smith was suspected of stealing a maroon Chevrolet truck from a car lot. I was sent a copy of their report, 2004-1506.

Mr. Smith's identity was confirmed with a jail booking photograph. I began an audio recording of the interview. I gave Mr. Smith his Miranda warning which he said he understood and waived his rights and spoke with me. I asked him about the Idaho incident, saying he was being accused of stealing a truck from Idaho.

Mr. Smith said he had been in Idaho about a week and half ago, and went to a car lot by a Hollywood Connection and test drove some cars, but denied stealing cars.

Mr. Smith also told me he met a guy named Josh just after getting out of jail, but did not know his last name. Mr. Smith said Josh drives a blue Mustang. Mr. Smith said he had arranged to buy a white truck located in Ogden from Josh. He said the truck was damaged and Josh was going to fix it and sell it to Mr. Smith for \$10,000.

Mr. Smith then told of a story, on the night of 10/03-04/04 where he and Josh were going to buy drugs. He said they ended up in Idaho and went to a Hollywood Video to buy videos. He said he then waited across the street while Josh went to the car lot and went inside. Mr. Smith admitted that he went inside the office on the lot and saw that the door to the office had been kicked open. He said Josh took the keys for the truck and they left, with Josh driving the truck and him the Mustang.

Mr. Smith also admitted he went to the Walmart in Jerome with Josh, and said he wanted no part of what was going on and left Josh, hitch hiking back to Ogden where he then took a UTA bus to Salt Lake. Refer to the audio taps for details.

When I began asking about where the truck was Mr Smith requested I turn off the tape recorder, which I did.

Mr. Smith then said that there was another person involved, Derek (unknown last name) who is married to a friend of his, Kenya Thompson. He said Derek is also called "Mississippi". He said it was actually Derek that stole the truck and drove it to Utah, somewhere on the south front. He said he did not know where the truck was, but would let him get it back if he was cleared of the auto theft charges. We made the agreement in writing. I told him I would pass along the word to the Idaho authorities. Mr. Smith did not reveal the location of the stolen truck. He also denied attempting to take any other cars, or stealing a trailer.

Smith also admitted that he was told by Josh that he was going to

Incident #: 041055239

Washed VINs on the truck they took, so it would not be traceable.

This information will be forwarded to the Minniscota County Sheriff's Office. The audio tape will be booked into evidence.

End of report.

Suppression Computer Consulting
Dispatch System

Activity Summary Report

Date: 11/11/20
Time: 14:37:
Page:

Call Type: VBR Priority 4 Status:

Vehicle Burglary Report

Entered By 802 TORI STRAUBHAAR

Received: 10/04/2004 08:18 Call #: 150282

Address: HOLLYWOOD VIDEO

Phone:

BURLEY

ID 83318

Section

Contact JOSHUA

Phone: 878-0477

Assigned To:

373 SGT PEGGY MARIZZA

Primary Vehicle Involved:

Lic. Plate: ST Country

Make Model

VIN Year

Type Body Style Color

Comments

Dispatched 10/04/2004 08:18 PM

EnRoute to Scene 10/04/2004 08:18

Arrived 10/04/2004 08:20

Next Call Back 10/04/2004 08:30

En-Route to Hospital

Cleared 10/04/2004 10:00 H

Comments

RAN JOHNSTON, JOSHUA B DOB 19841118

Full Description

RP ADVISING HE IS OUT OF LAYTON UTAH AND SOMETIME AROUND 800 PM LAST NIGHT A FRIEND OF HIS STOLE A VEH FROM THE CAR SALES NEXT TO THE VIDEO STORE HE IS WEARING BLUE JEANS AND BLK T-SHIRT STATED HE BELIEVES HIS FRIEND SLIPPED SOMETHING INTO HIS MOUNTAIN DEW AND DRUGGED HIM

Jasen - Here is the info.

Seuffer

LAW SCREEN

Nature:
THEFT - VEHICLE

Responsible Officer:
GARY OVERLIN

Agency:
MINIDOKA CO. SHERIFF'S OFFICE

Incident Number:
MCS-2004-1106

Address:
302 OVERLAND AVE
BURLEY, IDAHO 83318

Reported Date: 11:04:00 10/04/2004
Disposition: CLEARED BY ADULT ARREST

Received By: BEV LALLMAN
Disposition Date: 10/04/2004

How Received: TELEPHONE
Law ID: 71284

Complainant:

Offenses:

Reported Offense:

Observed Offense:

Offense

Amount

Circumstances:

Circumstance

Comments

Flagged Offense:

Factor

Method

Responding Officer:

GARY OVERLIN

VIC WATSON

Narrative:

11-1

On October 4, 2004 at 0935 hrs., I was dispatched to 302 North Overland Ave to Payless Sales. On arrival I met with Dan Price, the owner of Payless sales, and Deputy Peggy Marizza from Cassia County.

I made contact with Joshua Johnston.

Joshua Johnston stated that last night he and his friend, Ddana, came to this location from Utah. Joshua stated that Ddana gave him a Mountain Dew that had been opened. He stated that after he drank the Mountain Dew he started feeling wrong, like he had been drugged.

Joshua stated that Ddana kicked the door open to Payless Sales and then gave him a key to the red 2003 Chevy Duramax. Joshua stated that he had driven the vehicle to a Walmart Store somewhere and then back to this location. Joshua stated that he had hit something with the side of the pickup while he was at Walmart.

Joshua stated that at around 0530 hrs. this morning, Ddana left the parking lot with the Maroon Chevy Duramax with a trailer hooked behind it.

Detective Vic Watson arrived at the scene and took over talking to Joshua Johnston.

I made contact with Dan Price, the owner of the Payless sales. Dan stated that there was damage to the red Duramax that was left here and also showed me what the two males had been doing.

I took photos of the damage to the red 2003 Duramax Chevy pickup with vin # 1gchk23173f103270. The passenger side had a large dent and there was white paint transfer on the pickup with around 3000 dollars damage.

The two males had tried putting a 2004 white chevy blazer into a box trailer. The door to the trailer was open and the tire tracks from the blazer lead up to the back of the trailer where it was now parked.

The two suspects also tried putting the same blazer onto a flat bed trailer. The tire tracks showed where the vehicle had been part way onto the trailer.

There was a foot print on the front door to the office where the door had been kicked

open. The shoe print did not match with Joshua's shoe that he had on at this time. Dana had kicked the door open and had removed the keys from the office for the vehicles.

There was also an ID Card on the office desk belonging to Jeffrey Torres, who all three salesmen stated that they did not know where the Id came from. I placed the Id Card with this report and also placed the finger print cards in evidence.

Dan Price signed the 2003 maroon Chevy Duramax with vin # 1gchk23183f121583, as stolen and also Dan Price signed the 2004 Pace Trailer as stolen, vin # 4p2ub14264u050870. Itmes

1, Maroon 2003 Chevy Duramax, vin # 1gchk23183f121583 stolen - \$36,000.00

1, white Pace box trailer - \$4000.00 stolen

1, red 2003 Chevy Duramax - \$3000, damage to passenger side, vin 1gchk23173f103270

Damage to office door - \$400.00

VW 10-06-04

On October 04, 2004, I was sent to 302 North Overland Avenue to assist Deputy Gary Overlin with an investigation. On arrival at this location, Payless Auto Sales, Deputy Overlin told me one pickup and one cargo trailer had been stolen. One other pickup had been taken from the lot and damaged. The damaged pickup had been returned and one of two suspects had turned himself in at the scene. Payless Auto Sales is in North Burley, State of Idaho, Minidoka County.

PROPERTY LINE

I spoke to Joshua Johnston, a nineteen year old Layton, Utah resident. Joshua gave me an account of the previous weekend he spent in Utah and Idaho that eventually led to Payless Auto in North Burley. This account involved another man who Joshua said drugged him and guided him through a night of bizarre criminal activity that resulted in the theft of a pickup and cargo trailer from Payless. Joshua said he met a thirty year old black man named Dana at a night club in Salt Lake. They partied together with another man named Derik Thompson. The three of them traveled around the Salt Lake area on Sunday and eventually left Derik behind. Joshua said he took Dana to his parent's home in Woods Cross, Utah before heading to Idaho on Sunday evening. Somewhere along the way, Joshua said Dana gave him an opened can of Mountain Dew to drink. Joshua told me things became distorted from that point on. In the evening he called his parents and told them he was in Malad, Idaho. Joshua does not know why he was in Malad, just that he was. The two were traveling in Joshua's dark blue 1999 Ford. Mustang and ended up in Burley. Joshua told me they came upon Payless Auto and Dana took over with planning and implementing their criminal activity the rest of the night. Joshua said whatever drug he was on, allowed him to believe everything Dana said.

Joshua said the night in Burley started with a trip to Hollywood Video next to the car lot. The two purchased some items and left. Dana and Joshua went to the car lot where Dana kicked in the door to the small office building. This was confirmed by a clear size ten shoe print on the outside of the door. The print looks like a tennis shoe with the size 10 visible. Joshua was wearing flipflops and has a small foot. Once inside, the two took keys to two Chevy Duramax diesel pickups. Dana drove a maroon 2003 Duramax and Joshua drove a red 2003 Duramax from the lot. The two drove the pickups to Jerome, Idaho where they went to the Wal-Mart. The pair went inside and bought more items. They then decided to fuel the pickups at the Wal-Mart gas station. After fueling, Joshua wrecked the side of the red Duramax into a gas station barrier standard near the pumps. The pair just left and got on the interstate and drove back to Burley. Neither pickup had any kind of plate or temp in the window. Joshua said he had his laptop with him along with a printer. Somewhere between Burley and Jerome, Joshua took a digital image of a license plate off of a semi trailer. This image was downloaded into Joshua's laptop, modified, then printed out on a portable printer/fax/copier machine. When the pair were in the Jerome Wal-Mart, they purchased license plate covers and installed the phony paper plates behind the covers on the pickup. This was only done to the pickup Dana was driving for reasons unknown to Joshua. The plate was out of

LAW SCREEN

California, # 4AP2916.

When the two returned to Burley they went back to Payless Auto. This was around one or two in the morning. The rest of the night this pair did all sorts of activity at this lot. They took Joshua's car across the bridge into Burley and parked it behind the Guadalajara Restaurant at 262 Overland Avenue. There, they unloaded all of Joshua's property into one of the Duamax pickups. They drove back to the car lot and hooked up trailers behind the pickups. (Payless sells two or three brands of trailers) To get the trailers they wanted, the pair moved other trailers around. Once hooked up, they attempted to load another vehicle into a cargo trailer. It would not fit so they loaded it onto a flatbed. About this time, Joshua claims to start regaining a sense of reality. Joshua said he unloaded the vehicle off the trailer hooked to his Duramax, drove to his car across the river, unloaded his property back into his car, and returned to the car lot. Dana took off at this point with one of the Duramax pickups, towing a cargo trailer. Both have been entered NCIC. Joshua said this was around 5:30 A.M. and he realized he had acting in a bizarre manner. He called his parents in Utah with his cell and told them this story. Joshua asked them to come and help because he was not in a stable frame of mind. Joshua waited for approximately two hours on the lot. Around 7:30 he went to Hollywood Video to use the restroom. They were not open so he went back later when they were open. He was let in early by Beatriz Leon. She told me Joshua used the restroom then asked her to call the local police. Beatriz called the Cassia County Sheriff's Office and handed the phone to Joshua. Joshua told the dispatcher he was involved in illegal activities all night at the car dealership and wanted to turn himself over to authorities. Cassia Deputy Marriza arrived around the same time Joshua's parents showed up from Utah. Since this happened in Minidoka County, Cassia turned it over to Minidoka.

After collecting evidence and interviews, I cited Joshua for Driving Without Owners Consent per I.C. 49-227 (citation #9907) and Unlawful Entry per I.C. 18-7034 (citation #9908). Joshua did not show intent to deprive on the vehicle but did joyride the vehicle. Joshua did not break into the the office building but he did enter to retrieve keys. Further charges and follow up are pending in reference to the Jerome County incident. Affidavit pending.

RANDALL WHITE

Wednesday, Oct. 06, 2004 @ 10:00:31, Detective Vic Watson and I met with Dan Price victim/owner of the stolen truck. Mr. Dan Price told me that he went to Utah yesterday, October 5, 2004, and Jacob showed him several places Dana took him prior to coming to Idaho.

On Thursday October 7, 2004, I received a call from West Valley Utah Police Department, Detective James Wright, who told me that he took a photo line up to Joshua Johnson who identified number 3 as the person he knew as Dana. Detective Wright also told me that he showed the line up to Joshua's mother, Mrs. Darla Johnson, who identified number 3 as the person that came to her house with Joshua. Number 3 is a photo of Dana Lydell Smith of 533 South Montgomery Street, Salt Lake City, Utah. Detective Wright told me that he went by the house at 533 South Montgomery Street but did not see the stolen truck or trailer. I received a fax copy of Detective Wright's report and an email with the photo line up and a photo of Dana Lydell Smith.

Tuesday, Oct. 12, 2004 11:17:41, I received information that the stolen trailer was located in Malad Idaho. The trailer had a Enterprise Rental Car license plate 2CL1061on it. Malad Dispatch req fax of information on the truck. (208) 766-2891.

On Wednesday October 26, 2004 I interviewed Dana Lydell Smith at the Salt Lake County Jail. I recorded the conversation on digital recorder. Dana Smith told me that he went to Idaho with Joshua Johnson and Derik Thompson. Dana Smith told me that Joshua Johnson kicked in the door to the auto sales building. Dana told me that he went into the

LAW SCREEN

building to see what Joshua was doing. I asked Dana about the two trucks that were stolen from Pay Less Sales on October 4, 2004. Dana told me that he and Joshua went and got gas and then returned to Burley. Dana told me that he was in the one truck as it left Idaho but that Derik Johnson was driving. I asked Dana about the white cargo trailer that was found near the freeway at Malad Idaho. Dana told me that he was a sleep most of the trip and that Derik must have dropped the trailer.

On the same day I also talked with Derik Thompson. I showed Derik a photo of Dana Smith and he told me that he had seen Dana and Joshua the night before they went to Idaho. Derik told me that Dana and Joshua stayed for a while at a house in Salt Lake City and that some time in the night they left. Derik told me that he does not hang with Dana because he doesn't trust him because of some previous dealings.

Vehicle Property (UCR)

Declared Incident Status	Date	Reported Value
MARON 2003 CHEVROLET SILVERADO IDAHO		
TOTAL REPORTED VALUE = \$40,000.00		
STOLEN LOCALLY	10/06/2004	\$40,000.00
TOTAL RECOVERY VALUE = \$40,000.00		
RECOVERED OTHER	12/08/2004	\$40,000.00
WHITE 2004 ENCLOSED CARGO IDAHO		
TOTAL REPORTED VALUE = \$4,000.00		
STOLEN LOCALLY	10/06/2004	\$4,000.00
TOTAL RECOVERY VALUE = \$4,000.00		
RECOVERED OTHER	12/08/2004	\$4,000.00

ID Numbers

ID Number	ID Type	Comments
-----------	---------	----------

Other

Occurred

After: 11:00:00 10/04/2004
Before: 11:00:00 10/04/2004

Additional Information

Clearance:
Judicial Status:
Arrest:

Involvements

Involvement	User	Record ID	Date	Comments
NAME				
JOHNSTON, JOSHUA E	Yes	39403		
is suspect of THEFT - VEHICLE (#MCS-2004-1506)				
SMITH, DANA LYDELL	Yes	39503		
is suspect of THEFT - VEHICLE (#MCS-2004-1506)				
PRICE, DAN WAYNE	Yes	39495		
is victim of THEFT - VEHICLE (#MCS-2004-1506)				
ITATION				
UNLAWFUL ENTRY	Yes	28342		
has suspect THEFT - VEHICLE (#MCS-2004-1506)				
DRIVING W/O OWNER'S CONSENT	Yes	28343		
has suspect THEFT - VEHICLE (#MCS-2004-1506)				
ICLE				

LAW SCREEN

Involved	User	Record ID	Date	Comments
MAROON/ 2003 CHEVROLET SILVERADO IDAHO is vehicle loss of RECOVERED OTHER - THEFT - VEHICLE (#MCS-2004-1508)	No	20902		
WHITE/ 2004 ENCLOSED CARGO IDAHO is vehicle loss of RECOVERED OTHER - THEFT - VEHICLE (#MCS-2004-1508)	No	20903		

November 17, 2004

Bob Nielsen
P.O. Box 706
Rupert, Id 83350

Why Did Bob Nielsen Request This?

Dear Bob,

As per your request, in this letter I will give you a statement pertaining to the night and morning in question, to the best of my recollection:

In the early morning hours of October 3rd around one o'clock I was attempting to enter a night club in downtown Salt Lake. It was past last call; therefore they would not let anyone else in. I still wanted to try and party, so I waited around until they closed down at about two o'clock that morning. I was just sitting in my car talking to a girl passing by when I was approached by a black man in his early twenties. He introduced himself as Derrick, "Mississippi," and asked me if I wanted to go with him to a party, I said sure. He walked back to his group of friends, a few minutes later he gave me a wave to come over and he introduced me to "the gang," as he referred to them. I was only standing there about fifteen minutes when some kind of scuffle occurred, and he came up to me and said, "let's get in your car and split." We got into my car and this big black woman in her mid twenties started punching and kicking my car trying to get at Derrick. I put my car in reverse and drove off. About a block away he asked if we could go back so that he could get something from his friend, he called this guy "Numba' 5." We proceeded back to the night club and this woman was nowhere in sight so we pulled up to his friend. He removed his car keys and a face plate for his radio. Not thinking about where this woman was Derrick got out of the car to tell his friends goodbye. When this woman came out from behind a parked car and lunged at him with a sharp object. He ran back to me and got in my car and asked me for my cell phone to call 911. At this point in time is when my memory gets fuzzy. I can't recall the 911 telephone conversation, but I can remember not meeting with any police officer. Also going over to what I believed was Derrick's grand parents house and then over to his girlfriends house. We were there talking when he asked me how much I knew about computers, and I told him that I knew quite a bit about different programs and just basic knowledge about computers. At that time he went into one of the back bedrooms and got a laptop and brought it out to me. All that I can remember about this laptop is that there was some kind of check making software disc in the cd-rom drive. When I noticed this I said that I didn't like to go through other peoples personal things. I turned it off and went out to my car to get my laptop to show it to him. I was on my computer for a while not paying attention to what everyone else in the house was doing, because I was uploading some of Derrick's music cds onto my laptop. Derrick went in and out of one of the bedrooms talking on the phone, to what I presume was more than one person. When he was done on the phone he said that I could crash there if I wanted to. I should have gone home when he went to bed, because this is where my twenty-four hour not so fun "adventure" began.

I was sitting in the kitchen on my computer playing games and listening to music when I overheard a man in the living room sobbing and talking to some other people. He was saying that he just got out of jail and was looking for some woman who he hadn't seen since he was locked away. At that time I got up and went into the living room. I remembered that a girl that I met on the first of October said that she had some brothers in Salt Lake that she couldn't get a hold of. Not being able to remember her name I asked all of them if they had heard of a girl that goes by the nickname "CoCo." I was thinking at the time that maybe one of these guys might be her brother. The man who was upset got off of the couch and calmly said that she might be someone he knew as Misty. We then introduced ourselves to each other and his name was Dana. We then left in my car to go to the Davis County Jail to see if this girl might be incarcerated.

It was around five in the morning, on the third of Oct., when we left to go to the jail. While we were there he called a bail bonds man to come and see if she was there. While we were waiting we sat in my car and talked for a while. I then found out that the girl he was crying over, he claimed was his ex-wife and that her parents lived in Bountiful. We were unsuccessful in finding this girl at the jail, so he then asked me if I would take him to Bountiful. He wanted to see if he could locate his ex-wives parent's house. I remember driving by a house that was under construction and he believed that this house was theirs. Out of some lala land in his mind he thought that his ex and her family were all murdered and he was freaking out. I had my doubts, but instead of taking him back to the house where we met, I said that I believed him. He then asked me to take him to a business in south Salt Lake, some kind of a craft business called TLC. After leaving there, it was around eight in the morning. I don't remember where we went or what we did, but at nine-thirty that morning we went to my parent's house in Woods Cross. We left my parent's house around ten o'clock to go to my apartment to try and get some sleep.

who wrote this?

The rest of that afternoon is a blur, but according to my cell phone bill and what people have told me, I went over to my girlfriend's house around eleven-thirty and back to my apartment at about a quarter to twelve. Between then and about four we were at my apartment. While we were there he used my cell phone to make some calls and then we went back to my girlfriends. I told her that we were going to Las Vegas for a day or two to get away. While I was inside talking to my girlfriend he was outside making some more call. When I went outside to say to him lets go, he said he wanted to go to Ogden to get some weed for the trip. I had stopped smoking about three weeks before, but I didn't have a problem with going there, just as long as he didn't do it in my car. It was around four-thirty when we went back to my apartment. I put my laptop, printer, digital camera and a few other items in my car to stay in Las Vegas for a few days. We didn't leave there until about six-thirty to head to a house somewhere in west Ogden near 24th street. I have tried to go back to locate this house, but I still can't remember where it is. During our brief time there Dana and the other guy there really pressured me, they were trying to get me to smoke and I kept saying no. Finally Dana asked if I wanted a drink and I said sure. Dana and this other guy went into the kitchen. I overheard what I thought was just him getting some weed, but they mentioned something about a Klonopin. At the time I had no idea what they were talking about, but just the other day my girlfriend showed me an article in a magazine about date rape drugs. Apparently Klonopin is an anti-anxiety medication that is just started showing up in the "club drug" circle. Dana brought me back a liter of Mountain Dew, and said "I opened it to have a drink, I hope you don't mind." I didn't even think about it and said that it wasn't a problem. We then left, outside he said that I looked tired and asked for my keys to drive and I gave them to him. Now just to let you know, I have a '98 Ford Mustang and the only other person that I have ever let drive my car is my dad. I don't trust anyone else enough to drive it, but for some reason I didn't even think to say no.

code words

We got on the freeway and he started asking me questions about my dad. Not paying attention to the road and just to his questions I didn't notice that we were heading north, when Las Vegas is obviously south. Dana said that when we went to my parents that morning he recognized my dad. Drifting from the subject he saw a couple cars that seemed to be traveling together, he pointed them out and said that those cars were running drugs. He followed these cars pushing my car up to and probably over 90 miles per hour. The whole time he kept talking about little details, like for example, one of the cars was full of girls, therefore it was the car with the drugs in it. Another one of the cars had two guys in it, so that car had to be the "bodyguards," and somewhere along the way there was a small foreign sports car, so that car had to be the passy car. He was so convinced that these cars were running drugs to somewhere in Idaho. He kept driving in front of all of them and then changed lanes to slow down to get behind them. He said that this is what my dad's real job was, traveling the highways to find drug runners. If another trucker, like my dad, saw us doing this maneuver there would be some kind of a signal for us to back off. Believe it or not, just north of Melad there was an Idaho State Patrol car sitting on the side of the road with its hazard lights on. That was his "sign," he got off the freeway just north of Devil Creek, turned around and started heading south. He then asked me if I would call my dad so he could talk to him and ask him some questions. He asked my dad for where his wallet and his id was at. My dad just told him he had the wrong guy and that he didn't know who Dana was.

After he got done talking to my dad he said something about code words, and that my dad knew who I was with and that I was safe. We stopped in Tremonton to get gas where I went inside to use the restroom and pay for the gas. Apparently while I was inside he used my cell phone to make a call and when I came out he said that he was going to continue driving. I didn't pay attention to where we got onto the interstate at, but we somehow went from Tremonton back to Idaho. When we passed the border I remember asking how in the hell did we get going back the wrong way. His response was something along the lines of, he wasn't paying attention but it had to be a sign for us to go to Burley and stop the drug runners. That is the last thing that I remember about the trip into Idaho. I don't know if we were on I-15 or I-84. The thing that I remember next is stopping at a Maverick because he was thirsty, he brought out two different energy drinks already open saying that he just wanted to see what they both tasted like. At the time I had no idea where we were, but when I went to my first court appearance in Rupert I recognized the Maverick. It was around eleven or later that night and the only other thing I remember about being there is driving around the town square and something about the Riverside Bar. I don't know when we left there or where we went while we were there, but when we left we went to Burley. Now the only thing that sticks out in my mind is: I had no idea how we got there, but Dana knew exactly how to get from Rupert to Burley and I don't remember asking anyone for directions. It seemed all too familiar for him, like he'd been there before.

When we arrived in Burley we stayed on one road, Overland Ave. and didn't go on any other road. We drove back and forth over the Snake River at least two or three times not going more than a half of a mile from it. We finally stopped at a gas station to ask someone for directions. I went in to talk to the clerk and had her draw us a map to find the Riverside Bar and I took it out to Dana. We went back to the bridge over the Snake River and he insisted that it had to be near there, but I had no idea at the time that we were not even close. For some reason he decided that we should walk, so he parked my car behind a mexican restaurant just south of the Snake River. We walked over the bridge and through the Pay Less car lot. He looked at the map and said to me that the girl at the gas station didn't draw us a map to a bar, but actually to this car lot. There just happened to be two almost brand new Chevy Duramax pickup trucks. I don't remember any kind of conversation about taking the trucks, but I remember going into the Hollywood Video next door and buying some DVD's for him. When we left

the video store I don't remember what we were going to do, but I know that we were going back to my car for something. On our way back to my car some police officers came down the street and blocked the bridge, which I found out later was because there was a jumper. Dana said something and we ran behind the closest building, which I found out later was the Desert Industries right across the street. He found a ladder somewhere and we climbed over the fence and sat in a trailer behind the building for at least an hour.

My mind is an absolute blank from this point on, until about five-thirty the next morning. I can't remember any conversations or anything that would give a reason for what we did. There are little details that stick out, the rest I had to find out from other people. Apparently we went back to the car lot and Dana broke into their office while I was around the back looking for a place to relieve myself. He gave me the keys to one of the pickup trucks, a red one, and then I followed him. We went back to my car and took my belongings that were in there. I put the majority of it into the truck that I was driving and then I followed him onto the freeway. He led the way and we drove the trucks west. Somewhere between Burley and Jerome, we pulled off to the side of the road where Dana had me take a picture of a semi trucks license plate. It was a California trailer plate. He wanted me to remove where it said trailer with my computer and print a couple of duplicates to put on the trucks. I took the picture, but had no power to print anything, so we then got on the freeway again and continued west and stopped at a Wall-Mart in Jerome. There I purchased two plastic license plate covers and a power inverter for a cigarette lighter in the truck. While I was printing these fake license plates in the parking lot of Wall-Mart, Dana had some kind of an idea to go back to where we got the trucks for something else. I finished the plates and he put his on the truck he was driving and I put the other on the one I was driving. We started towards the freeway when I noticed I was out of gas and pulled into a Chevron across from the Wall-Mart. I got out to refuel the truck but the pumps were shut off, so I got back in the cab to go to the other gas station that was on the same side of the street as Wall-Mart. I wasn't thinking clearly enough and made a sharp of a turn and damaged the right side of the truck before I went across the street to meet Dana and fuel up. When we were finished we got back on the highway and went back east to the car lot in Burley.

After we arrived back at the car lot Dana went rummaging in the office and found a log book. He then convinced me that the hand writing in it was my dad's and that this place was set up for me and him as some part of a witness protection program. I don't know what led him to believe this, but at that moment something got into his head that we were supposed to take two trailers with two other cars. He found two ball hitches and put them on the trucks and told me to hook up a flatbed trailer. When I thought that I had it attached to the truck I pulled the truck forward and he then gave me the keys to a Trailblazer. He said to put that one on the trailer and he would try to find something that would fit into a cargo trailer. Now just to let you know, I have never put any kind of an automobile onto a trailer, let alone pulled a trailer with a full-sized pickup. My first attempt was unsuccessful and I didn't know what to do. The trailer came off of the ball hitch so I unhooked it and tried to put the Trailblazer on the trailer without it being hooked to the truck. Not knowing what I was doing and getting frustrated, I called my dad. He asked me what in the world was I doing and I told him that I found his log book and he had no idea what I was talking about. He asked me where I was and I said that I thought I was in Burley. He wanted to know what I was doing in Burley. I told him what Dana had said to me. He told me to get away from him and he would come up, because he knew that something was wrong. After I got off the phone with my dad I told Dana that he was on his way up and he got very uneasy. He said not to wait for my dad and that we just needed to leave right now. He went outside the office, hooked up a cargo trailer and left. It was then that I started to come back to the real world. I took the truck that I was driving back to my car and put all of my stuff back in there. I then went back to the car lot and just sat there to wait for my day. At about nine that morning I started to come down off of whatever I was on. My conscience got to me and I went over to the Hollywood Video to use the restroom and call the police. I also got the number of Dan Price off the office door and called him.


At about the same time that the police showed up so did my parents and we spent almost the whole day going over the details. I had a hard time concentrating on the events that had happened, but as the day went on my head became clearer. Detective Vic Watson was called in on the case and he questioned me and then my mother. She told the detective that I had sleep deprivation and how out of it I was. Little did we know that I am Bi-polar which added to my hallucinations and confusion. Vic Watson believed that something strange was going on. He called the D.A. to ask what the charges were to be issued. He came over to me and said that he appreciated my cooperation and only gave me two misdemeanor charges. He asked my parents if they would take me to the hospital to get a drug screen. He was curious about what drug I was given to make me hallucinate. The hospital wouldn't do the test without a doctor's order, but they gave us a number for a mobile drug screening. After I finished my drug test we went back to the car lot to talk with one of the owners, Dan Price. With his help, my parents and I followed him to the local police station in Burley. I hooked my laptop up to the internet to download some software for my G.P.S. runner. I had this on me at the time I went to Derrick's house the following morning. After I gave him the G.P.S. location of the house my parents and I went home.

Since that day I have been helping Dan and the Salt Lake County Sheriff's department. I took Dan over to the house where I met Dana, this was on the 5th of October. On the 7th a detective from Salt Lake came to meet me and my mom

12
at our house with a photo line-up. We both identified Dana with a 100% surety. They did arrest him in Salt Lake for other charges and he had six prior offenses. Idaho did submit his APB into the system the Friday after the theft, with my cooperation.

I appreciate you taking on my case. If you have any questions feel free to call me or my mom.

Thank you.



Josh Johnston

Exhibit 2

Business Records of DENNIS
BYINGTON DEFENSE COUNSEL
AND Stanley Holloway which
substantiate A Conflict of
Interest at the Trial level



Idaho Statutes

TITLE 18 CRIMES AND PUNISHMENTS

CHAPTER 10 BARRATRY AND ATTORNEYS AT LAW

18-1004. ATTORNEY DEFENDING WHEN PARTNER PROSECUTES. Every attorney who directly or indirectly advises in relation to, or aids, or promotes the defense of, any action or proceeding in any court, the prosecution of which is carried on, aided or promoted by any person as prosecuting attorney, or other public prosecutor, with whom such person is directly or indirectly connected as a partner, or who, having himself prosecuted or in any manner aided or promoted any action or proceeding in any court as prosecuting attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to, or takes any part in, the defense thereof, as attorney or otherwise, or who takes or receives any valuable consideration from, or on behalf of any defendant in any such action, upon any understanding or agreement whatever having relation to the defense thereof, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor, forfeits his license to practice law.

History:

[18-1004, added 1972, ch. 336, sec. 1, p. 867.]

The Idaho Code is the property of the state of Idaho and is made available on the Internet as a public service. Any person who reproduces or distributes the Idaho Code for commercial purposes is in violation of the provisions of Idaho law and shall be deemed to be an infringer of the state of Idaho's copyright.

State of Idaho

Department of State

CERTIFICATE OF AMENDMENT OF

BYINGTON, HOLLOWAY & JONES, CHARTERED

I PETE T. CENARRUSA, Secretary of State of the State of Idaho hereby certify that duplicate originals of Articles of Amendment to the Articles of Incorporation of _____

BYINGTON, HOLLOWAY, WHIPPLE & JONES, CHARTERED

duly signed and verified pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Certificate of Amendment to the Articles of Incorporation and attach hereto a duplicate original of the Articles of Amendment.

Dated January 26, 19 90.



Pete T. Cenarrusa

SECRETARY OF STATE

[Signature]
Corporation Clerk

RECEIVED
SEC. OF STATE

ARTICLES OF AMENDMENT

RECEIVED
SEC. OF STATE

OF

'90 JAN 26 PM 1 35

BYINGTON, HOLLOWAY & JONES, CHARTERED

'90 JAN 23 AM 8 42

The undersigned, who are natural persons of full age and citizens and residents of the State of Idaho and the United States of America, wish to amend the Articles of Incorporation for the above corporation as follows:

ARTICLE I

The name of the corporation is now Byington, Holloway & Jones, Chartered.

ARTICLE II

The Articles of Incorporation are amended as follows:

Article I shall read:

"The name of the corporation shall be Byington, Holloway, Whipple & Jones, Chartered."

Article IV shall read: .

"The location of the corporation and its initial registered office is 111 West 15th Street, City of Burley, County of Cassia, State of Idaho, 83318. The initial registered agent at such address shall be Dennis R. Byington."

Article VII shall read:

"The below names shall constitute the initial board of directors of this corporation until the first annual meeting of the stockholders."

Dennis R. Byington
970 Stevens Place
Burley, ID 83318

Stanley Holloway
Rt. #2, Box 2112
Burley, ID 83318

ARTICLES OF AMENDMENT - 1

Douglas R. Whipple
621 West 25th
Burley, ID 83318

Kay Jones
Rt. #1, Box 1320
Paul, ID 83347

ARTICLE III

This adoption was made on the 1st day of December, 1989, by the incorporators.

ARTICLE IV

No shares have been issued.

ARTICLE V

The names and mailing addresses of the incorporators of this corporation are as follows:

Dennis R. Byington
970 Stevens Place
Burley, ID 83318


Stanley Holloway
Rt. #2, Box 2112
Burley, ID 83318

Kay Jones
Rt. #1, Box 1320
Paul, ID 83347

IN WITNESS WHEREOF, We have made and subscribed these Articles of Amendment in duplicate originals this 22nd day of January, 1990.


DENNIS R. BYINGTON - Incorporator


STANLEY HOLLOWAY - Incorporator


KAY JONES - Incorporator

Friday, September 23, 2011

- 8:00 - 8:15 Registration
- 8:15 - 8:30 Dick Rubin
Opening Remarks
- 8:30 - 9:15 Evan Jenness
Ethics & Your Client - Is There A Problem?
- 9:10-10:00 Jeff Robinson
The Art of Jury Selection
- 10:00 - 10:15 BREAK
- 10:15 - 11:00 Evan Jenness
Ethics & Evidence - OMG What Do I Do Now?
- 11:00 - 12:00 Christina Hunt
The Evidence Toolbox - How To Get Out The Hammer
- 12:00 - 1:30 LUNCH ON YOUR OWN
- 1:30 - 2:15 Jeff Robinson
Minimizing Bad Evidence Without Destroying It
- 2:15 - 3:15 Hon. Mark W. Bennett
Allocution and the Importance of Being Earnest
- 3:15 - 3:30 BREAK
- 3:30 - 4:15 Melissa Winberg
9th Circuit Update
- 4:15 - 5:30 Being Geeky is Cool!: Dennis Byington, Charles Peterson
- 6:00 - 7:30 Cocktail Party
Basque Market, 608 Grove St.



Discover Idaho's hidden beauty, epic adventures, and rich cultural traditions. Raft exciting rapids; backpack in the nearby mountains; bike, jog, skate, or walk a 25-mile paved network of paths linking 9 parks along the Boise River; or fly fish to your heart's content in the nearby sparkling clear rivers. And Sun Valley is only an easy 2 1/2 hour drive. Additionally, Boise is alive with shops, galleries, coffee houses and new restaurants.



ANNUAL WESTERN ALL-STAR
CONFERENCE & CONFABULATION

REGISTRATION

SEPTEMBER 22nd & 23rd, 2011
THURSDAY AND FRIDAY
THE GROVE HOTEL
245 CAPITOL BLVD.
BOISE, IDAHO

NAME: _____

TELEPHONE: _____

Registration Fee: CJA panel attorneys, Public Defenders, and law students:

_____ \$50 Thursday (9/22) only prepaid

_____ \$50 Friday (9/23) only prepaid

_____ \$90 Thursday & Friday prepaid

* Add \$10 to fees for door registration

For information regarding Thursday (9/22) Capital Habeas Day agenda contact Nicole Brown (208) 331-5530.

Prepaid registration deadline is September 15, 2011

Send your registration and check payable to Federal Defender Services of Idaho, 702 W. Idaho Street, Suite 1000, Boise, Idaho 83702

Includes admission to the seminar, written materials, and refreshment breaks.

Questions? Call Kathy Bozman at (208) 331-5508

**ANNUAL WESTERN ALL-STAR
CONFERENCE &
CONFABULATION**

SEPTEMBER 22, 2011
Capital Habeas Day

SEPTEMBER 23, 2011
Criminal Defense Day

"ROYAL WEDDING? WE'VE GOT THE JEWELS!"

THE GROVE HOTEL
245 Capitol Blvd.
Boise, Idaho



Boise is located between the edge of the great basin and the edge of the Rocky Mountains and boasts an average of 230 sunny days annually making recreational activities a must.

Sponsored by Federal Defender Services of Idaho and The Idaho Association of Criminal Defense Lawyers


CLE credits pending approval by the Idaho State Bar

STATE OF IDAHO
County of Cassia

)
ss.
)

On this 22nd day of January, 1990, before me, the undersigned, a Notary Public in and for said State, personally appeared Dennis R. Byington, Stanley Holloway and Kay Jones, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

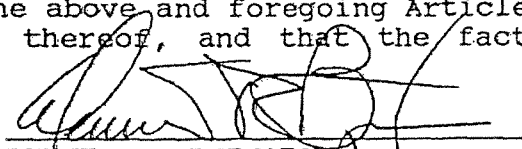
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.


Notary Public for Idaho
Residing at: Nailton
My Commission Expires: 4-24-95

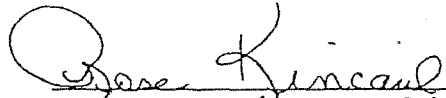
STATE OF IDAHO)
County of Cassia) ss.

Dennis R. Byington, being first duly sworn on oath, deposes and states:

That he is an officer and incorporator of the above corporation and that he has read the above and foregoing Articles of Amendment, knows the contents thereof, and that the facts stated therein are true.


DENNIS R. BYINGTON

I, Rose Kincaid, a notary public, do hereby certify that on this 25th day of January, 1990, personally appeared before me Dennis R. Byington, who, being by me first duly sworn, declared that he is an officer and incorporator of the above corporation, that he signed the foregoing document as an officer and incorporator of the corporation, and that the statements therein contained are true.


Notary Public for Idaho
Residing at: Nailton
My Commission Expires: 4-24-95



FEDERAL DEFENDERS Idaho

EVAN A. JENNESS

Evan Jenness has been named one of the *Best Lawyers in America*, and a *Southern California Super Lawyer*. Her practice is devoted exclusively to representing individuals and organizations in investigations, pretrial, trial and appellate proceedings. Other areas of expertise include extradition, sentencing mitigation and legal ethics. Evan A. Jenness obtained her *juris doctor* degree from Columbia University Law School. Ms. Jenness is a deputy federal public defender, and is a periodic writer and author on federal criminal law and procedure, and professional ethics. Ms. Jenness has expertise in the area of professional responsibility and ethics in criminal defense practice, and frequently advises lawyers and others, writes and lectures on issues including the duty to protect client confidences, conflicts of interest, prosecutorial misconduct, the attorney-client privilege and work-product doctrine, ineffective assistance of counsel, contempt, the duty of candor, and other matters implicating criminal law ethics. A native Bostonian, Ms. Jenness grew up in various countries in Africa, as well as the United States, and enjoys international travel. She is married and resides in Santa Monica, California.

JEFF ROBINSON

Jeff Robinson is a shareholder at Schroeter, Goldmark & Bender (SGB) and a graduate of Harvard Law School. Before joining SGB he was a King County Public Defender and Assistant Federal Public Defender. He teaches and speaks nationally about trial advocacy, including as a faculty member of the National Criminal Defense College in Macon, Georgia. Mr. Robinson is listed in *Best Lawyers in America* and, in 2003, was chosen as King County Bar Association's "Lawyer of the Year" and selected by *Black Enterprise* magazine as one of the "Top 100 Black Lawyers in America." A member and past president of the Washington Association of Criminal Defense Lawyers (WACDL), he received WACDL's 2004 William O. Douglas Award. Mr. Robinson is a Fellow in the American College of Trial Lawyers and a member of the John Adams Project, a small group of lawyers chosen by the ACLU and the National Association of Criminal Defense Lawyers to help in the representation of the "High Value Detainees" held at Guantanamo Bay and charged with capital murder for alleged assistance in the 9-11 attacks. Mr. Robinson is the co-winner of the 2009 Washington State ACLU Civil Libertarian Award.

CHRISTINA HUNT

Christina Hunt is the Senior Litigator for the Federal Defenders for the Middle District of Georgia, Inc. Before joining that office, Tina was Senior Litigator with the Federal Defenders of Eastern Washington and Idaho where she had worked for 14 years after a long stint in private practice in Macon, Georgia. A graduate of Furman University and Mercer University Law School, Tina has practiced criminal defense since 1985. Before moving to Washington, Tina taught Trial Practice at Mercer Law School and was the Associate Dean of the National Criminal Defense College. She is a member of the National Criminal Defense College faculty, and has taught at the Western Trial Advocacy Institute, the Institute for Criminal Defense Advocacy, the Georgia Institute of Trial Advocacy, and the New York State Defender's Association. She also taught trial advocacy at Gonzaga Law School in Spokane, WA and has spoken at various seminars around the country on trial skill topics.

HONORABLE MARK W. BENNETT

Mark W. Bennett has served as U.S. District Court Judge in the Northern District of Iowa since August 26, 1994. Judge Bennett graduated from Drake University Law School in 1975. He started his own law firm in Des Moines upon graduation. Judge Bennett has sat by designation on both the Eighth and Ninth Circuit Courts of Appeals and in 2010 sat as a trial court judge in the District of the Northern Mariana Islands (Saipan) and in 2011 is sitting as a trial court judge in federal court in Tucson on multiple occasions. Judge Bennett frequently speaks at seminars throughout the U.S. on topics such as federal litigation, civil rights, employment law, professionalism, and courtroom technology. Judge Bennett is a prolific writer and his more than 1200 published opinions reflect his keen interest in legal scholarship. Judge Bennett was also one of the first federal district court judges in the country to allow live blogging from his courtroom. He is also featured in a yet to be released BBC documentary on crime in America where he allowed unusual access to his courtroom and was filmed leading a discussion group at a federal prison of 10 inmates he had sentenced who each received a mandatory minimum sentence in a drug case. Obsessions and compulsions beside the law include collecting abstract art and red wine, two book groups, and his bowling team (living proof that relatively high I.Q.'s and advanced degrees are inversely related to success in this sport.)

CHARLES PETERSON

In his nearly thirty years of trial practice, Chuck Peterson has represented high-profile clients in some of the most visible criminal cases in the Northwest. His clients have faced trials on charges ranging from DUI to murder. His practice is not limited to criminal cases, and he has tried civil cases involving accident and wrongful death, contract disputes, securities fraud, and racketeering. He serves as a member of the Idaho Criminal Rules Committee, and he has been included in *Best Lawyers in America* since 2006. He authors a blog that focuses on civil, criminal and civil rights trial practice - and he has been using technology in trial since he built his first database for a securities fraud case in the late 1980s. Most recently, Chuck has been

using and writing about the iPad and its application to trial practice.

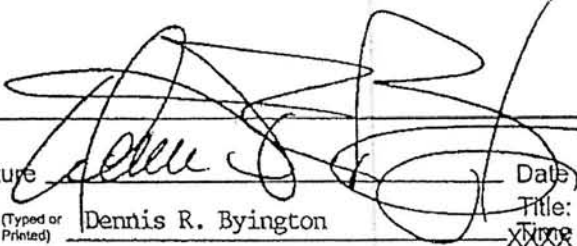
DENNIS R. BYINGTON, ESQ.

Dennis Byington is an Idaho native and father of eight. He obtained his BA in speech and drama education, with a Spanish minor, from BYU in 1974. He served on active duty in the US army and then went on to the University of Idaho, College of Law in 1979. Mr. Byington has practiced law in Burley since 1982. He was a shareholder in Byington, Holloway, Whipple and Jones, chartered and Byington law office, chartered until 2005 when he helped organize the full time two-county "Mini-Cassia Public Defender Office. He is still the Public Defender and manages the office. He is active in his community in theater, the local symphony, and church. He has previously participated as a presenter in education classes for the Idaho Water Users Association, the Twin Falls Legal Secretary Association and The Idaho Trial Lawyers Association.

MELISSA WINBERG

Melissa Winberg is the research and writing attorney for the Federal Defender Services of Idaho. Previously, she was a law clerk to Chief Judge Curtis L. Collier of the Eastern District of Tennessee, where she worked on civil, criminal, and disciplinary cases. She graduated from Vanderbilt University Law School and worked for Wiley Rein in Washington DC, and FCC Commissioner Deborah Taylor Tate.

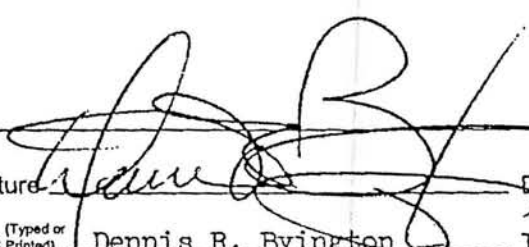


No. C 90305	Due no later than Sep 30, 2000 Annual Report Form	2. Registered Agent and Office NO PO BOX DENNIS R. BYINGTON 111 W 16TH ST BURLEY, ID 83318																														
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	1. Mailing Address - Correct in this box, if applicable BYINGTON & HOLLOWAY, CHARTERED DENNIS R. BYINGTON PO BOX 188 BURLEY, ID 83318	3. New Registered Agent Signature																														
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors. <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; border-bottom: 1px solid black;">Office held</th> <th style="text-align: left; border-bottom: 1px solid black;">Name</th> <th style="text-align: left; border-bottom: 1px solid black;">Street or P.O. Address</th> <th style="text-align: left; border-bottom: 1px solid black;">City</th> <th style="text-align: left; border-bottom: 1px solid black;">State</th> <th style="text-align: left; border-bottom: 1px solid black;">Zip</th> </tr> </thead> <tbody> <tr> <td>President</td> <td>Dennis R. Byington</td> <td>970 Stevens Place</td> <td>Burley</td> <td>ID</td> <td>83318</td> </tr> <tr> <td>Secretary</td> <td>Stanley Holloway</td> <td>42 Volz Lane</td> <td>Burley</td> <td>ID</td> <td>83318</td> </tr> <tr> <td>Directors</td> <td>Dennis R. Byington</td> <td>970 Stevens Place</td> <td>Burley</td> <td>ID</td> <td>83318</td> </tr> <tr> <td></td> <td>Stanley Holloway</td> <td>42 Volz Lane</td> <td>Burley</td> <td>ID</td> <td>83318</td> </tr> </tbody> </table>			Office held	Name	Street or P.O. Address	City	State	Zip	President	Dennis R. Byington	970 Stevens Place	Burley	ID	83318	Secretary	Stanley Holloway	42 Volz Lane	Burley	ID	83318	Directors	Dennis R. Byington	970 Stevens Place	Burley	ID	83318		Stanley Holloway	42 Volz Lane	Burley	ID	83318
Office held	Name	Street or P.O. Address	City	State	Zip																											
President	Dennis R. Byington	970 Stevens Place	Burley	ID	83318																											
Secretary	Stanley Holloway	42 Volz Lane	Burley	ID	83318																											
Directors	Dennis R. Byington	970 Stevens Place	Burley	ID	83318																											
	Stanley Holloway	42 Volz Lane	Burley	ID	83318																											
5. Organized Under the Laws of: IDAHO C 90305	6. <div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> Signature  Name (Typed or Printed) <u>Dennis R. Byington</u> </div> <div style="width: 35%;"> Date <u>7/31/00</u> Title: <u>President</u> Title </div> </div>																															

Issued 07/10/2000

Do Not Tape or Staple

918

No. C 90305	Due no later than Sep 30, 2001		2. Registered Agent and Office NO PO BOX		
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	Annual Report Form		DENNIS R. BYINGTON		
	1. Mailing Address - Correct in this box, if applicable BYINGTON LAW OFFICE, CHARTERED DENNIS R. BYINGTON PO BOX 188 BURLEY, ID 83318		111 W 16TH ST BURLEY, ID 83318 3. New Registered Agent Signature		
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.					
Office held	Name	Street or P.O. Address	City	State	Zip
President	Dennis R. Byington	970 Stevens Place	Burley	ID	83318
Director	Dennis R. Byington	970 Stevens Place	Burley	ID	83318
5. Organized Under the Laws of: IDAHO C 90305		6. Signature  Date 7/19/01 Name (Typed or Printed) Dennis R. Byington Title President			

Issued 07/02/2001

Do Not Tape or Staple

945

FILED/EFFECTIVE
FEB 11 AM 8:48
STATE OF IDAHO

ARTICLES OF AMENDMENT

OF

BYINGTON & HOLLOWAY, CHARTERED

The undersigned, who is a natural person of full age and a citizen and resident of the State of Idaho and the United States of America, wishes to amend the Article of Incorporation for the above corporation as follows:

ARTICLE I

The name of this corporation is now BYINGTON & HOLLOWAY, Chartered.

ARTICLE II

The Articles of Incorporation are amended as follows:

Article I shall read:

"The name of the corporation shall be BYINGTON LAW OFFICE, Chartered.

ARTICLE III

The adoption will be made on the 15th day of February, 2001, by the shareholder.

ARTICLE IV

The name and mailing address of the shareholder of this corporation is as follows:

Dennis R. Byington
970 Stevens Place
Burley, ID 83318

IN WITNESS WHEREOF, I have made and subscribed these Articles of Amendment in duplicate originals this 14th day of February, 2001.


DENNIS R. BYINGTON
TODAY SECRETARY OF STATE

ARTICLES OF AMENDMENT - 1

04/11/2001 09:00
CK: 5738 CT: 3525 BH: 390353

1 8 38.00 = 38.00 AMEND PROF # 2

C90305

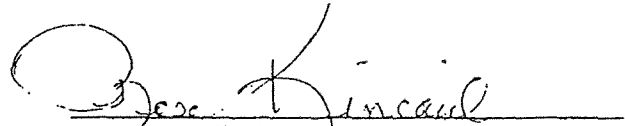
STATE OF IDAHO)

ss.

County of Cassia)

On this 14th day of February, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Dennis R. Byington, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Notary Public for Idaho


Residing at: Manitou

My Commission Expires: 4-27-2001

Exhibit 3

Idoc Policy AND Procedure
Number 405.02.01.001 AND
Resource Request showing
that the prison has no ~~last~~
Research tools. (case law)

Smith 87

 Idaho Department of Correction	Standard Operating Procedure Dual Divisions Operational Services	Control Number: 405.02.01.001	Version: 4.0	Page Number: 1 of 17
		Title: Access to Courts		Adopted: 8-15-1995 Reviewed: 11-2-2012 Next Review: 11-2-2014

This document was approved by Kevin Kempf, chief of the Division of Prisons, and Shane Evans, chief of the Division of Education, Treatment, and Reentry, on 11/2/12 (signature on file).

Open to the general public: ☒ Yes ☐ No

If no, is there a redacted version available: ☐ Yes ☐ No

BOARD OF CORRECTION IDAPA RULE NUMBER 405

Court Proceedings within a Facility

POLICY CONTROL NUMBER 405

Access to Courts

DEFINITIONS

Standardized Terms and Definitions List

Access to Courts Request Form: A printed form provided for offenders to make requests for accessing Idaho Department of Correction (IDOC)-provided legal resources or assistance from IDOC paralegal staff.

Access to Courts Manual: An Idaho Department of Correction (IDOC) manual that contains qualified legal claim packets and forms for offenders to file initial pleadings with a court.

Legal Mail: Confidential communication directly between (a) an offender and an attorney (for the purposes of seeking or providing legal services only), (b) an offender and the court, (c) opposing parties for service of documents (pursuant to court rules), or (d) third parties for service of documents (pursuant to court rules).

Legal Resources: Those statutes, codes, court rules, legal reference materials, and publications provided by the Idaho Department of Correction (IDOC) for use by offenders on legal matters.

Paralegal: A person hired by the Idaho Department of Correction (IDOC) to assist offenders with (a) completing legal packets and forms, and (b) accessing IDOC-provided legal resources, notary services, and translator services.

Resource Center: An area of a facility — designated and approved by the facility head — where (a) legal resources are maintained, and (b) the photocopying and mailing of legal materials are performed pursuant to written Idaho Department of Correction (IDOC) or facility guidelines.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 2 of 17
---	------------------------	-----------------------------------	--------------------------------

Unauthorized Practice of Law: The practicing of law by any person (a) who has not become duly admitted and licensed to practice law within the state of Idaho; (b) whose right or license to practice within the state of Idaho has been terminated either by disbarment, suspension, or failure to pay license; or (c) who practices or assumes to act or hold himself out to any other person as a person qualified to practice law, to include giving legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.

PURPOSE

The purpose of this standard operating procedure (SOP) is to establish guidelines for providing all offenders access to the courts so that they may pursue constitutionally mandated legal actions and other legal filings identified by the Idaho Department of Correction (IDOC).

SCOPE

This SOP applies to all offenders, and to all employees involved in the planning, management, or operation of any activity which governs the legal activities of offenders.

Note: This SOP shall also only apply to correctional facilities (prisons) and community work centers (CWCs). Hereinafter, correctional facilities (prisons) and CWCs shall be referred to as 'facilities'.

RESPONSIBILITY

Facility heads (or their designee) are responsible for (a) the implementation of this SOP, and (b) ensuring the guidelines and procedures provided herein are adhered to.

In carrying out their responsibilities, facility heads (or their designee) will:

- Make readily available to offenders locked boxes designated for access to courts request forms.
- Make access to courts request forms readily available to the offender population.
- Designate a location (generally the Resource Center) where all legal resource material will be kept.

Table of Contents

General Requirements	3
1. Qualified Legal Claims	3
State Court	4
Federal Court	4
2. Process to Request Access to Courts Assistance, Services, and Resources	5
Access to Courts Request Process	5
3. Authorized Photocopies	5
Class Action and Multiple Offender Legal Actions	6
4. Mailing and Photocopying Court Documents and Legal Mail.....	6

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 3 of 17
---	------------------------	-----------------------------------	--------------------------------

Procedure for Filing Pleadings and Other Documents with a Court	6
5. Service of Documents Upon Opposing Parties	7
Service on the IDOC, Idaho Board of Correction, Idaho Commission of Pardons and Parole, or Any Employee Thereof	7
Service on an Offender	8
6. Access to Court Supplies for Indigent Offenders	8
Procedure to Obtain Indigent Supplies	9
7. Offenders Who are Unable to Complete Forms	9
8. Offender-to-Offender Assistance	9
Obtaining, Completing, and Processing Affidavits	10
9. Right to Retain Counsel	10
10. Supervision of Paralegal Staff	10
11. Duties of Paralegal Staff	11
12. Legal Resources	12
13. Telephone Hearings and Attorney Telephone Calls	12
Table 13-1: Telephone Hearings	12
Table 13-2: Attorney Telephone Calls	12
14. Forms for Qualified Legal Claims	13
Prohibited Forms	13
15. Access to Courts Procedures for Facilities without a Resource Center	13
Table 15-1: Resource Centers	14
Table 15-2: Process Steps for Offenders Housed at Facilities without a Resource Center	14
16. Storage of Excess Legal Materials	14
Process Steps: Storage of Excess Legal Materials	15
17. Record Retention	17
18. Attorney Visits	17
19. Confidential Mail	17
20. Searching Legal Material	17
References	17

GENERAL REQUIREMENTS

1. Qualified Legal Claims

The IDOC has identified the following legal claims and legal claim packets in which paralegal staff will assist offenders.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 4 of 17
---	------------------------	-----------------------------------	--------------------------------

Note: If an offender is in need of assistance other than what is identified as qualified legal claims as set forth in this SOP, then the request for assistance should be sent via an Offender Concern Form (see SOP 316.02.01.001, *Grievance and Informal Resolution Procedures for Offenders*) to the Division of Prison's access to courts coordinator for consideration.

State Court

The Access to Courts Manual contains the following legal claim packets that are appropriate for filing in state court:

- Rule 35. (Correction or reduction of sentence)
- UPCPA. (Uniform Post-conviction Procedure Act)
- State civil rights.
- State habeas corpus.
- General appeals.
- UPCPA appeals.
- Rule 35 appeals.
- Probation revocation appeals.
- Modification of Idaho child support order.
- Medical malpractice.
- Tort claim.
- Credit for time served.
- Power of attorney.
- Miscellaneous forms.

Federal Court

The Access to Courts Manual contains the following legal claim packets that are appropriate for filing in federal court:

- Federal civil rights.
- Federal habeas corpus.
- 9th Circuit appeal appeals.
- Writ of Certiorari appeals.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 5 of 17
---	------------------------	-----------------------------------	--------------------------------

2. Process to Request Access to Courts Assistance, Services, and Resources

Access to Courts Request Process

Functional Roles and Responsibilities	Step	Tasks
Offender	1	<ul style="list-style-type: none"> Request paralegal assistance, services, and resources using the applicable Access to Courts Request Form; and Place the signed form in the designated lock box. <p>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.</p>
Paralegal Staff	2	Gather the access to courts request forms each business day.
Paralegal Staff	3	Send the requested resources (e.g., a form or qualified legal claim packet) to the offender using institutional mail (see SOP 402.02.01.001, <i>Mail Handling in Correctional Facilities</i>), or schedule a visit with the offender at the Resource Center or other location.
Paralegal Staff	4	<p>If requested, provide the offender with the list of qualified legal claim packets (see <u>section 1</u>) from which to choose.</p> <p>Note: If offender is illiterate see step 8.</p>
Paralegal Staff	5	Allow the offender to review legal resources at the Resource Center or check out legal resources for a designated period.
Paralegal Staff	6	If books are checked out, log in the Daily Book Check-out Log (located in the Access to Courts database).
Paralegal Staff	7	<p>If the offender requests assistance, help the offender complete authorized court filings.</p> <p>Note: If the offender has a physical disability, is unable to prepare or write the materials or documents, and requires assistance, see <u>section 8</u> of this SOP.</p>
Paralegal Staff	8	<p>If the offender is illiterate in the English language:</p> <ul style="list-style-type: none"> Arrange for an IDOC staff member, who speaks the offender's native language, to interpret; or Arrange for another offender, who speaks the offender's native language, to interpret; or Access the Language Line Services to provide interpretation.
Offender	9	<p>Complete the claim for filing with the court.</p> <p>Note: To complete this process, also see <u>section 4</u> of this SOP.</p>

3. Authorized Photocopies

Authorized photocopies include:

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 6 of 17
---	------------------------	-----------------------------------	--------------------------------

- Documents and all attachments allowed pursuant to this SOP that are ready to be filed with the court **and** opposing counsel, as required.
- A completed Power of Attorney signed by the offender **and** notarized, if needed.

Note: If there is a question regarding the documents or attachments, paralegal staff will determine what documents are necessary based on court rules or by contacting the court.

Class Action and Multiple Offender Legal Actions

When offenders jointly file documents and attachments with the court as co-plaintiffs (parties to the legal action) photocopies shall not be made for all parties to the legal action because a full photocopy must be maintained in the Resource Center. However, the offender who filed the legal action with the court will have the option of paying for one additional full photocopy, which must be maintained as his personal copy. Upon request, all other parties to the legal action will be allowed to review the photocopy maintained in the Resource Center.

Photocopies of subsequent filings regarding the legal action shall be placed with the previous photocopy maintained in the Resource Center so that a full and complete record of the legal action is available.

If an offender who is a party to the legal action is transferred to another facility, then a full photocopy of the initial filing and subsequent filings can be made for that offender at his own expense. However, if the offender meets the requirements to be considered indigent as defined in SOP 402.02.01.001, *Mail Handling in Correctional Facilities*, a full photocopy can be made for that offender upon his request at no expense to the offender.

4. Mailing and Photocopying Court Documents and Legal Mail

Photocopying privileges for offenders include the following conditions:

- Offenders (excluding indigent offenders) will be charged a fee of ten cents (\$.10) per page for copies.
- Offenders (excluding indigent offenders) should use their own envelopes for court filings; however, by necessity to meet a court filing deadline, if envelopes are obtained through the Resource Center, offenders (excluding indigent offenders) will be charged the equivalent commissary price.
- Page limitations on pleadings may be enforced in accordance with court rules.

Note: Mail sent to the Idaho Judicial Council, Idaho State Bar, or courts is not (by definition) legal mail and is therefore subject to search. However, paralegal staff shall still log mail sent to these entities on the Outgoing Legal Mail Log (located in the Access to Courts database).

Procedure for Filing Pleadings and Other Documents with a Court

Functional Roles and Responsibilities	Step	Tasks
Offender	1	Complete the documents, forms, or pleadings to be photocopied and mailed.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 7 of 17
---	------------------------	-----------------------------------	--------------------------------

Functional Roles and Responsibilities	Step	Tasks
Offender	2	Submit to the paralegal staff the applicable Access to Courts Request Form for copies, notary (if needed), and mailing services. Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.
Paralegal Staff	3	<ul style="list-style-type: none"> Meet with the offender; and Determine those documents authorized for photocopying in accordance with this SOP.
Paralegal Staff	4	Notarize the documents that require a notary (if needed).
Paralegal Staff	5	Photocopy the documents as required by court rules.
Paralegal Staff	6	<p>Within two (2) business days of completing the request:</p> <ul style="list-style-type: none"> Complete an <u>Offender Personal Funds Withdrawal Slip</u>; and Forward it to the facility financial specialist (or designee) for processing. <p>Note: If the offender is indigent, you do not need to complete a withdrawal slip nor charge the offender for photocopying the documents.</p>
Paralegal Staff	7	Complete the <u>Outgoing Legal Mail Log</u> (located in the Access to Courts database) and if needed, the Notary Services Log.
Paralegal Staff	8	If necessary, forward the legal mail to the mailroom for postage and mailing.

5. Service of Documents Upon Opposing Parties

Note: Service of a Summons and Complaint via mail does not constitute effective service in a state of Idaho court matter.

Service on the IDOC, Idaho Board of Correction, Idaho Commission of Pardons and Parole, or Any Employee Thereof

An offender shall neither attempt, nor cause another offender **acting** on his behalf to attempt to personally serve the IDOC, the Idaho Board of Correction, the Idaho Commission of Pardons and Parole, or any employee thereof, with any legal documents.

Service on the IDOC, the Idaho Board of Correction, the Idaho Commission of Pardons and Parole, or any employee thereof, by an offender or member of the general public, shall be made by personal service upon a deputy attorneys general (DAG) who represents the IDOC. Service on any other person or entity shall be the sole responsibility of the offender.

Note: Any service upon a DAG must (a) be in accordance with applicable court rules and (b) take place at Central Office. (See *Idaho Rules of Civil Procedure [IRCP]*, rules 4 [d] 2 and 4 [d] 5; *Federal Rules of Civil Procedure*, rule 4; and Idaho Administrative Procedure Act [IDAPA] 06.01.01, section 106.)

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 8 of 17
---	------------------------	-----------------------------------	--------------------------------

Service on an Offender

In General

When an offender is served with a summons and complaint that is not a qualified legal claim (as described in section 1) and which requires a response per *IRCP* or *Federal Rules of Civil Procedure*, the offender shall be provided the opportunity to file a response. Paralegal staff shall provide mailing and photocopying services (see section 4) that are consistent with court filing requirements.

Note: Paralegal assistance (see section 11) shall be limited to the initial response only.

By an Outside Process Server

Occasionally, an offender may be served with court documents regarding a civil action filed against the offender. Federal and state of Idaho court rules provide for service to be conducted by any outside process server who is 18 years of age or older and not a party to the case. The outside process server does not have to be law enforcement personnel or a professional process server.

If a victim to the offender's crime is on legal aid, the victim may make a request to the IDOC victim services coordinator to help coordinate service on the offender.

Note: Due to significant security concerns about letting an outside process server come into a facility to serve documents, each facility shall develop a field memorandum to describe service of process on offenders at that facility. The Division of Prison's access to courts coordinator should be contacted to provide guidance to facility staff in the development of the field memorandum.

6. Access to Court Supplies for Indigent Offenders

Indigent status is defined in SOP 402.02.01.001 *Mail Handling in Correctional Facilities*. If an offender does not meet the requirements as defined to be considered indigent, the paralegal (or other facility head-designated staff member per section 15) shall ensure the offender has the ability to access the courts in accordance with this SOP. This may include providing the offender with indigent supplies, photocopying documents for the offender, or providing postage, if necessary. For example, if an offender has one dollar and twenty cents (\$1.20) in his Offender Trust Account and needs to make 30 photocopies of a motion and mail it to the court to be filed, the paralegal (or other facility head-designated staff member per section 15) shall accommodate the request even though the offender does not have enough money in his account to cover the full expense of photocopying and mailing the motion.

Indigent supplies include the following:

- Blank paper for preparing court filings (no more than 25 sheets in an offender's possession at any time).

Note: Indigent offenders should use preprinted forms if available. The blank sheets of paper must have the facility name and the terms 'indigent legal paper' printed in the bottom left corner of at least one side of the paper to identify it as paper that has been authorized for legal work.

- Envelopes for mailing at the time of filing or to a verifiable attorney of record.
- One security pen (black ink only) on an exchange basis.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 9 of 17
---	------------------------	-----------------------------------	--------------------------------

Note: The sufficient amount of postage required to mail authorized legal documents for filing shall be affixed to the envelope (see SOP 402.02.01.001, *Mail Handling in Correctional Facilities*).

Procedure to Obtain Indigent Supplies

Functional Roles and Responsibilities	Step	Tasks
Offender	1	Request indigent supplies using the applicable Access to Courts Request Form.
		Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP). The form comes in English and Spanish.
Paralegal Staff	2	Determine what indigent supplies are needed.
Paralegal Staff	3	By individual items, enter the indigent supplies in the Resource Center Indigent Offender Supplies Log and Access to Courts database.
Paralegal Staff	4	Issue the indigent supplies to the offender.

Note: If the offender is misusing or wasting the indigent supplies issued to him, the facility head (or designee) may limit the number of indigent supplies the offender has on hand or is issued.

7. Offenders Who are Unable to Complete Forms

An offender who believes he needs help completing qualified legal claim forms may:

- In accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*, and directive 503.02.01.001, *Offender Telephone Monitoring and Recording*, directly contact an attorney and seek representation at the offender's expense; or
- Complete a Motion and Affidavit in Support for Appointment of Counsel; or
- Request assistance from paralegal staff (see section 2 and/or section 8).

8. Offender-to-Offender Assistance

Offenders may assist one another with legal work under the following guidelines:

- Both offenders must live in the same housing unit and have access to one another during normal facility operations.
- The assisting offender cannot (a) work on the legal material alone, (b) be in possession of the other offender's legal materials, or (c) prepare or write the other offender's materials and documents unless the offender is unable to prepare or write them due to being illiterate in the English language or due to a physical disability.
- An offender shall not receive any item or service for helping another offender with legal work.
- An offender shall not represent another person in any legal proceeding.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 10 of 17
---	------------------------	-----------------------------------	---------------------------------

WARNING!

Offenders must not engage in the unauthorized practice of law. (Idaho Code, section 3-420; and In Re: Matthews, 58 Idaho 772.) Offenders may be referred to the Idaho State Bar for prosecution for the unauthorized practice of law. Any offender caught engaging in the unauthorized practice of law will be prohibited from assisting any other offender.

Obtaining, Completing, and Processing Affidavits

When affidavits are complete, the affidavits **and** copies of attachments becomes the property of the offender filing the claim. (The attachments that have the original signature will be returned to the offender providing the affidavit.)

When necessary, due to custody level; housing; or facility, paralegal staff will help offenders with the process of obtaining affidavits. To eliminate questions regarding the affidavit process, the following information must be obtained before the process begins:

- The **name and address** of the offender filing the document;
- The **court** in which the **case** is pending or will be filed;
- The **name** of the offender attesting to the information in the affidavit; and
- The case number if **one has been** assigned.

After the information **noted above is obtained**, the affidavit can be given to the offender attesting to the information. **The offender attesting** to the information can write the affidavit **or** sign the document if the offender filing the document wrote the information. If the offender attesting to the affidavit is in **another** facility, the paralegal staff will facilitate the process.

9. Right to Retain Counsel

This SOP is not intended to interfere with an **offender's right to retain** counsel.

10. Supervision of Paralegal Staff

The facility head will designate a deputy warden to provide **direct supervision** of paralegal staff. Paralegal staff will address operational issues with the **designated deputy** warden. The paralegal **or** deputy warden may contact the Division of Prison's **access to courts** coordinator regarding operational issues.

The chief of the Division of Prisons (or designee) will designate a **division access to courts** coordinator.

The Division of Prison's **access to courts** coordinator will report directly to the chief of the Division of Prisons (or designee) **and** be responsible for the following:

- Responding to any request that is not authorized pursuant to this SOP (also see the note box in section 1);
- Scheduling **and** coordinating paralegal meetings;
- Identifying training needs **and** agenda items for the meeting;
- Facilitating the meeting;

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 11 of 17
---	------------------------	-----------------------------------	---------------------------------

- Providing guidance to paralegal staff, facility staff, and IDOC administration regarding access to courts issues;
- Requesting clarification from the DAG's Office (who represents the IDOC) regarding access to courts issues;
- Requesting clarification of policy **and** SOP issues from the IDOC policy coordinator **or** Division of Prison's policy coordinator, as applicable (both coordinators are located at Central Office); and
- Maintaining **and** issuing the password to the password protected Access to Courts Manual only to those deemed as having a need to know, such as paralegals and attorneys.

11. Duties of Paralegal Staff

The IDOC shall employ paralegal staff to assist offenders with qualified legal claims. Paralegal duties include the following:

- Responding to any request described in this SOP.
- Providing offenders with IDOC-authorized legal resources.
- Providing offenders with qualified legal claims packets **and** appropriate instructions.
- Providing notary services to the offender population.
- Providing or securing translator services for non-English speaking **and** special needs offenders seeking assistance with initial pleadings for qualified legal claims.
- Maintaining the following logs **and** forms in the Resource Center:
 - ◆ Daily Book Check-out Log (Located in the Access to Courts database.)
 - ◆ Individual Activity Log (Located in the Access to Courts database.)
 - ◆ Notary Services Log (**Note:** Notary logs are the property of the notaries.)
 - ◆ Outgoing Legal Mail Log (Located in the Access to Courts database.)
 - ◆ Resource Center Attorney Telephone Call Request Form
 - ◆ Resource Center Copies Log
 - ◆ Resource Center Indigent Offender Supplies Log
 - ◆ Resource Center Request to Store Excess Legal Materials Form

A paralegal will **not**:

- Assist offenders to file any claim that is beyond the scope of this SOP.
- Offer legal advice. (**Note:** Assistance with grammar, spelling, or other matters not of a legal consequence shall not be considered offering legal advice.)
- Represent an offender.
- Refer offenders to attorneys or attorneys to offenders.
- Make unauthorized changes to Access to Courts Manual forms or packets.
- Schedule appointments for offenders to meet with each other.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 12 of 17
---	------------------------	-----------------------------------	---------------------------------

- Issue the password to the password protected Access to Courts Manual to any other persons.

12. Legal Resources

As described in table 15-1, Resource Centers will maintain the publications, forms, and packets listed in the Access to Courts Manual and make them available to the facilities they service.

Facility staff may not purchase additional items or create additional forms without the written approval of the director of IDOC (or designee).

Resources may be used in the Resource Center or checked out as approved by paralegal staff.

The IDOC does not provide for extensive or generalized legal research. If an offender wants additional research materials not available in the Resource Center, the materials may be received through the mail in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*.

13. Telephone Hearings and Attorney Telephone Calls

Table 13-1: Telephone Hearings

Functional Roles and Responsibilities	Step	Tasks
Facility Head	1	Designate an area(s) that can be used for telephone hearings.
Offender	2	Provide to paralegal staff a photocopy of the court order or notice of hearing at least 24 hours prior to the telephone hearing.
Paralegal Staff	3	Review the court order or notice of hearing.
Paralegal Staff	4	Ensure the offender is scheduled or made available at the time of the telephone hearing.
Paralegal Staff (or Designee)	5	Facilitate the telephone hearing call at the appropriate time.
Paralegal Staff	6	Log the call using the Individual Activity Log (located in the Access to Courts database).
Offender	7	Participate in the telephone hearing.

Note: If the offender fails to provide 24 hour notice to the IDOC, a paralegal staff will still facilitate the call, if possible.

Table 13-2: Attorney Telephone Calls

Offenders can place unmonitored telephone calls to their attorneys using the offender telephone system (see directive 503.02.01.001, *Offender Telephone Monitoring and Recording*). If an offender is unable to place a direct telephone call to his attorney using the offender telephone system, the offender may then (a) contact the attorney via mail (in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*) and request that the attorney place a telephone call to facility paralegal staff and ask them to

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 13 of 17
---	------------------------	-----------------------------------	---------------------------------

arrange a telephone call from the offender to the attorney **or** (b) simply just correspond with the attorney via mail.

Occasionally an attorney may have difficulty making contact with an offender because of schedule conflicts or due to the offender's inability to access the telephone at a specific time. If an attorney or attorney's agent contacts the paralegal requesting to talk to an offender, **and** the paralegal determines the normal process outlined in directive 503.02.01.001, *Offender Telephone Monitoring and Recording*, will not work, the paralegal will use the following process steps:

Functional Roles and Responsibilities	Step	Tasks
Attorney (or Attorney's Agent)	1	<ul style="list-style-type: none"> Contact the paralegal staff; and Request an attorney telephone call with the offender.
Paralegal Staff	2	Log the request using the Individual Activity Log (located in the Access to Courts database).
Paralegal Staff	3	Prepare a Resource Center Attorney Telephone Call Request Form to forward to the offender with the name of the attorney, the telephone number to call, and the date and time the attorney telephone call is to be placed.
Offender	4	Place the attorney telephone call.

14. Forms for Qualified Legal Claims

Authorized forms for qualified legal claims are maintained in the Access to Courts Manual. Only paralegal staff and designees have access to the manual (see section 10 for further details). The Access to Courts Manual table of contents lists the authorized materials.

Prohibited Forms

Offenders must not draft **or** possess the following.

- Completed **or** blank transport orders; **and**
- Blank letterhead stationery (of any kind).

15. Access to Courts Procedures for Facilities without a Resource Center

Offenders housed at St. Anthony Work Camp (SAWC), North Idaho Correctional Institution (NICI), South Boise Women's Correctional Center (SBWCC), or a CWC will use the appropriate Resource Center listed in table 15-1 to provide offenders access to court services. The Division of Prison's access to courts coordinator may also be contacted to provide services. The facility head (**or** designee) will designate a facility staff member to help offenders with general, day-to-day operational issues regarding access to courts matters. The Division of Prison's access to courts coordinator can make temporary (up to 60 days) reassignments of this reporting structure to accommodate training or staff shortages. The assigned paralegal staff member at the facility that has a Resource Center shall visit (as needed, but at least once a month) the facility served that does not have a Resource Center (see the following table).

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 14 of 17
----------------------------------	-----------------	----------------------------	--------------------------

Table 15-1: Resource Centers

Resource Center	Facility Served
Idaho Correctional Institution Orofino (ICIO)	<ul style="list-style-type: none"> • ICIO • NICI
South Idaho Correctional Institution (SICI)	<ul style="list-style-type: none"> • East Boise CWC • Nampa CWC • SBWCC • SICI • SICI CWC
Pocatello Women's Correctional Center (PWCC)	<ul style="list-style-type: none"> • Idaho Falls CWC • PWCC • SAWC

Table 15-2: Process Steps for Offenders Housed at Facilities without a Resource Center

Functional Roles and Responsibilities	Step	Tasks CIS steps are in bold
Offender	1	<p>Complete the applicable Access to Courts Request Form, asking the facility head (or designee) for paralegal assistance, services, or resources.</p> <p><i>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per section 15 of this SOP). The form comes in English and Spanish.</i></p>
Facility Head (or Designee)	2	<p>Place a telephone call to the appropriate Resource Center and, if possible, have the offender talk directly to a paralegal.</p>
Paralegal	3	<ul style="list-style-type: none"> • Tell the facility head (or designee) which services or resources the offender needs; and • Log the call using the Individual Activity Log (located in the Access to Courts database).
Facility Head (or Designee)	4	<ul style="list-style-type: none"> • Ensure the offender receives the services or resources; and • Document in the Corrections Integrated System (CIS), using the contact sheets, when the offender receives the services or resources.

For further assistance with CIS, see your designated CIS super user.

16. Storage of Excess Legal Materials

Each facility head will identify a secure area for storing an offender's excess legal materials.

The IDOC will store legal materials related to active and ongoing litigation that cannot be contained in an offender's authorized personal property. The amount of storage space needed will be taken into consideration when storing an offender's legal materials that are referenced in the offender's active and ongoing litigation.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 15 of 17
---	------------------------	-----------------------------------	---------------------------------

The IDOC will not store case law that is not specifically and directly related to an active and ongoing case, excess legal materials, multiple copies of pleadings, research materials, or materials not directly related to the offender's active and ongoing litigation.

Legal materials remaining after the offender has been released will be disposed of in accordance with SOP 320.02.01.001, *Property: State-issued and Offender Personal Property*. If the offender has paroled, any legal material he left at the facility shall be forwarded to the offender's new address **and documented in the Corrections Integrated System (CIS) in accordance with SOP 320.02.01.001**.

On an annual basis, paralegal staff (with the offender present) will review stored excess legal materials. If the offender cannot be present, paralegal staff will document the reason why using the Individual Activity Log (located in the Access to Courts database).

Note: Each facility shall develop a field memorandum to describe the process for offenders to store **and** retrieve their excess legal materials, **and** a process to inventory the material. The Division of Prison's access to courts coordinator should be contacted to provide guidance to facility staff in the development of the field memorandum.

Process Steps: Storage of Excess Legal Materials

For the purpose of this SOP only, 'secure storage' shall mean an area in a Resource Center or another part of the facility (a) that can be locked, and (b) where offenders and unauthorized staff do not have access.

Functional Roles and Responsibilities	Step	Tasks
Offender	1	<ul style="list-style-type: none"> Complete a Resource Center Request to Store Excess Legal Materials Form; and Submit it to housing unit staff for verification. <p>Note: If in need of the form, see a paralegal (or other facility head-designated staff member per <u>section 15</u> of this SOP).</p>
Housing Unit Staff	2	<ul style="list-style-type: none"> Verify that the legal materials are in excess of the allowable three (3) cubic feet of personal papers and legal materials allowable per SOP <u>320.02.01.001</u>, <i>Property: State-issued and Offender Personal Property</i>; and Complete the submitted Resource Center Request to Store Excess Legal Materials Form and return it to the offender.

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 16 of 17
---	------------------------	-----------------------------------	---------------------------------

Functional Roles and Responsibilities	Step	Tasks
Offender	3	<p>Submit the completed Resource Center Request to Store Excess Legal Materials Form to paralegal staff (or other facility head-designated staff member per <u>section 15</u> of this SOP).</p> <p>Note: If there are no case numbers, titles, court information, or required signatures on the form, paralegal staff (or the facility head-designated staff member) will return the form to you and the process will end here.</p> <p>Note: If needed, the paralegal staff (or facility head-designated staff member) will provide you with a box to store your excess legal materials. However, if you want to organize your excess legal materials when storing them, it shall be your responsibility to purchase organizing materials (e.g., file folders and manila envelopes) from the commissary and organize your excess legal materials prior to storing them.</p>
Paralegal Staff (or Designee)	4	<p>Verify case numbers, titles, court information, and whether required signatures are provided.</p> <ul style="list-style-type: none"> • If this information is not submitted — return the form to the offender and end the process here until the required information is submitted; or • If this information is submitted — proceed to step 5.
Paralegal Staff (or Designee)	5	<p>Inform the offender when to bring the excess legal materials to the secure storage location.</p> <p>Note: If needed, provide the offender with a box to store his excess legal materials. If the offender wants to organize his excess legal materials before storing them, it shall be the offender's responsibility to purchase organizing materials (e.g., file folders and manila envelopes) from the commissary and organize his excess legal materials prior to being allowed to store them.</p>
Paralegal Staff (or Designee) and Offender	6	<p>In accordance with <u>section 20</u> of this SOP and SOP <u>320.02.01.001</u>, <i>Property: State-Issued and Offender Personal Property</i>:</p> <ul style="list-style-type: none"> • Search the excess legal material for unauthorized items; and • Dispose of the unauthorized items in accordance with SOP <u>320.02.01.001</u>.
Paralegal Staff (or Designee) and Offender	7	<p>Clearly mark and identify each file folder or manila envelope with numbers and letters. (E.g., Box 2, File 3.)</p>
Paralegal Staff (or Designee)	8	<p>Create an inventory sheet for documenting and tracking the excess legal materials.</p>

Control Number: 405.02.01.001	Version: 4.0	Title: Access to Courts	Page Number: 17 of 17
---	------------------------	-----------------------------------	---------------------------------

17. Record Retention

Paralegal staff will retain copies of access to court forms, attachments, and other logs and documentation identified in this SOP as follows: five (5) years for paper **and** seven (7) for electronic records.

18. Attorney Visits

Attorney visits are explained in SOP 604.02.01.001, *Visiting*.

19. Confidential Mail

All indigent confidential mail shall be processed in accordance with SOP 402.02.01.001, *Mail Handling in Correctional Facilities*.

20. Searching Legal Material

Information regarding the search of offenders' legal material can be found in SOP 317.02.01.001, *Searches: Cell/Living Unit, and Offender*.

REFERENCES

Directive 503.02.01.001, *Offender Telephone Monitoring and Recording*

Federal Rules of Civil Procedure, Rule 4, *Summons*

Idaho Code, Title 3, **Chapter 4, Section 3-420**, *Unlawful Practice of Law – Penalty*

Idaho Department of Correction **Manual**, *Access to Courts*

Idaho Rules of Civil Procedure (IRCP), Rule 4 (d) (2), *Service Upon Individuals*

Idaho Rules of Civil Procedure (IRCP), Rule 4 (d) (5), *Service Upon State, Agencies or Governmental Subdivisions*

IDAPA 06.01.01, *Rules of the Board of Correction, Section 106*, *Service of Process on Department Employees*

Language Line Services (www.language-line.com)

Offender Personal Funds Withdrawal Slip

Standard Operating Procedure 316.02.01.001, *Grievance and Informal Resolution Procedures for Offenders*

Standard Operating Procedure 317.02.01.001, *Searches: Cell/Living Unit, and Offender*

Standard Operating Procedure 320.02.01.001, *Property: State-issued and Offender Personal Property*

Standard Operating Procedure 402.02.01.001, *Mail Handling in Correctional Facilities*

Standard Operating Procedure 604.02.01.001, *Visiting*

State of Idaho, Idaho Judicial Council (www.judicialcouncil.idaho.gov)

State of Idaho, Idaho State Bar (www.isb.idaho.gov)

State v. Mathews, 58 Idaho 772, 79 P.2d 535, (1938)

United States Courts (www.uscourts.gov)

United States Department of the Treasury, Internal Revenue Service (IRS) (www.irs.gov)

FILED

CASE #

2011 AUG 30 PM 4:59

PATTY TEMPLE, CLERK

ALS - DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

DANA LYDELL SMITH,

Plaintiff,

vs.

STATE OF IDAHO,

Defendant.

Case No. CV-2011-246

**ORDER DENYING THE PETITIONER'S
REQUEST FOR APPOINTMENT OF COUNSEL**

PROCEDURAL BACKGROUND

The Petitioner Dana Lydell Smith (hereafter "Mr. Smith") was convicted of Grand Theft in Minidoka County case CR-2004-2628. The court sentenced Mr. Smith to a unified term of confinement of fourteen years, with seven years determinate. The Idaho Court of Appeals affirmed Mr. Smith's judgment of conviction in an unpublished opinion filed May 20, 2009. Mr. Smith filed a Petition for Post-Conviction Relief in Minidoka County case CV-2008-892, which the court dismissed on May 7, 2010.

On February 18, 2011, Mr. Smith filed a successive Petition for Post-Conviction Relief in the present case. The State filed its answer on August 9, 2011. In his Petition, Mr. Smith makes the following arguments regarding the proceedings in the underlying criminal case prior to the appeal:

- (1) he was denied his right to counsel at a pre-trial lineup;
- (2) he received ineffective assistance of counsel at trial because his attorney:
 - (a) failed to investigate the facts of the case and potential defenses;
 - (b) failed to adequately prepare for trial;
 - (c) failed to call relevant witnesses;
 - (d) failed to file certain motions prior to and during trial;
 - (e) failed to object to specific evidence; and
 - (f) failed to request a specific jury instruction;
- (3) the court admitted prejudicial hearsay that the defense could not effectively cross-examine;
- (4) the prosecution suppressed evidence favorable to Mr. Smith;
- (5) the prosecution failed to collect or preserve evidence favorable to Mr. Smith;
- (6) the prosecution failed to disclose the identity of an informant who actively participated in and was a witness to the crime;
- (7) the court made errors that denied Mr. Smith a fair trial;
- (8) he was denied discovery of confidential records that were material to the defense;
- (9) he was selectively prosecuted based on his race;
- (10) the court denied him his right to a speedy trial;
- (11) the prosecution knowingly used, or failed to correct, perjured testimony;

(12) he was convicted as a result of a police interrogation conducted without counsel present after he requested counsel in the context of a separate investigation;

(13) his confession was obtained during a police interrogation in which he was denied the right to have counsel present; and

(14) the Idaho Department of Correction denied him his right to an adequate law library and legal assistance.

Mr. Smith makes the following arguments regarding the underlying criminal case during the appeal phase of the proceedings:

(1) his conviction was upheld, despite constitutional error;

(2) he received ineffective assistance of counsel on appeal because his attorney failed to raise the following issues on appeal:

(a) Joshua Johnston's perjury and the prosecution's inducement for him to testify;

(b) statements made to the jury which violated the court's ruling on a motion in limine;

(c) proper jurisdiction of the courts in Utah and in Idaho to rule on evidence and for law enforcement to initiate an investigation;

(d) Joshua Johnston's criminal history, mental health evaluation, and prior drug test while on probation;

(e) failure to secure additional medical records by counsel and expert witnesses to substantiate Mr. Smith's position that there was insufficient *mens rea* to support the criminal charges;

(f) inconsistencies in statements by law enforcement, the prosecutor, and prosecution witnesses which should have been suppressed or excluded;

- (g) whether the courts in Utah and Idaho were advised of evidentiary issues;
- (h) whether the actions of Dan Price and Dennis James corrupted the testimony of Joshua E. Johnson, due to their interaction with him in Utah; and
- (i) whether Mr. Smith's right to a speedy trial had been violated.

After setting forth all of his claims, Mr. Smith included in his Petition a request to proceed in forma pauperis and a request for appointment of counsel. He did not make these requests by separately filed motions, nor did he provide a supporting affidavit. Upon discovering Mr. Smith's request for appointment for counsel, the court took the matter under advisement.

DISCUSSION

Idaho Code § 19-4904 provides that a post-conviction petitioner may have court-appointed counsel. The decision to grant or deny a request for court-appointed counsel in a post-conviction case lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The court perceives the issue as a matter of discretion and exercises that discretion within the bounds provided by the following legal authority.

* A trial court should appoint counsel in a post-conviction case "if facts are alleged giving rise to the *possibility* of a valid claim." *Judd v. State*, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009). A court may only deny a request for appointed counsel if all the claims in the petition are frivolous. *Id.* A post-conviction claim that is time-barred is frivolous. *Hust v. State*, 147 Idaho 682, 686, 214 P.3d 668, 672 (Ct. App. 2009). *

A post-conviction petition "may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a). An

appeal is considered to be "determined" upon the appellate court's issuance of the remittitur. *See Leer v. State*, 148 Idaho 112, 114, 218 P.3d 1173, 1175 (Ct. App. 2009).

The one-year statute of limitations for post-conviction actions may be equitably tolled under the following circumstances: (1) "where the applicant was incarcerated in an out-of-state facility without legal representation or access to Idaho legal materials"; (2) "where mental disease and/or psychotropic medication rendered the applicant incompetent and prevented him from pursuing earlier challenges to the conviction"; or (3) in limited circumstances, where a petitioner discovers the facts giving rise to the claim at a later date. *Judd v. State*, 148 Idaho 22, 25-26, 218 P.3d 1, 4-5 (Ct. App. 2009).

The Idaho Court of Appeals affirmed Mr. Smith's conviction in an unpublished opinion filed May 20, 2009. The remittitur was issued on June 17, 2009. Pursuant to I.C. § 19-4902(a), Mr. Smith was required to file his post-conviction petition on or before June 17, 2010.¹ However, he filed this Petition on February 18, 2011, approximately eight months after the deadline. Therefore the claims in Mr. Smith's post-conviction Petition relating to the proceedings in CR-2004-2628 appear to be time-barred.

It does not appear that Mr. Smith has offered any explanation for the untimely filing of the Petition that would equitably toll the statute of limitations. He does not assert that he was incarcerated in an out-of-state facility without representation or access to Idaho legal materials; he does not assert that he was incompetent due to a mental disease or psychotropic medication

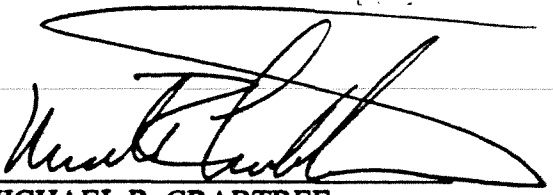
¹ The court acknowledges that since the Idaho Court of Appeals issued the remittitur, Mr. Smith has continued to file pro se motions in CR-2004-2628, including a Motion for a New Trial, a Motion for a *Faretta* Hearing, a Motion to Alter or Amend a Judgment, and a Motion for Correction or Reduction of Sentence, ICR 35. However, Mr. Smith has not raised any issues stemming from these post-appeal proceedings. Therefore, the statute of limitations on the issues he has raised began to run once the remittitur was issued on June 17, 2009.

which prevented him from pursuing earlier challenges to the conviction; and he does not assert that he discovered the facts giving rise to the claims at a later date.

CONCLUSION AND ORDER

Mr. Smith's claims in his post-conviction Petition appear to be time-barred. At this point, Mr. Smith has failed to show that the statute of limitations should be equitably tolled. Since the claims appear to be frivolous because they are untimely, Mr. Smith's request for appointment of counsel is denied.

It is so **ORDERED** this 30th day of August, 2011.



MICHAEL R. CRABTREE
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30 of August, 2011, I served a true,
correct copy of the ORDER DENYING THE PETITIONER'S REQUEST FOR
APPOINTMENT OF COUNSEL upon the following in the manner provided:

Minidoka County Prosecuting Attorney
P. O. Box 368
Rupert, ID 83350

() First Class Mail
(☒) Hand Delivery - Basket
() Facsimile

Dana L. Smith #87854
ICC-SICI, P. O. Box 8509
Boise, ID 83707

(☒) First Class Mail
() Hand Delivery - Basket
() Facsimile


Clerk of the District Court

By 
Deputy Clerk